

***United States Court of Appeals
for the Second Circuit***



APPENDIX

74-1674

ORIGINAL

B P/S

United States Court of Appeals
For the Second Circuit

VIACOM INTERNATIONAL INC., VIACOM LATINO AMERICANA
INC., VIACOM JAPAN INC., VIACOM CANADA LIMITED, VIACOM
VIDEO-AUDIO COMUNICACOES LIMITADA, VIACOM INTERNA-
TIONAL LIMITED, VIACOM S. A. and VIACOM INTERNATIONAL
PTY. LIMITED,

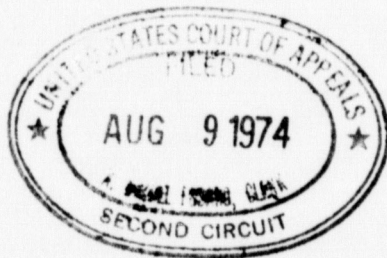
Plaintiffs-Appellees,

v.

TANDEM PRODUCTIONS, INC.,

Defendant-Appellant.

APPENDIX
VOLUME I OF THREE VOLUMES
(Pages 1a to 252a)



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DATE	PROCEEDINGS
7- 5-73	Filed Complaint. Issued Summons.
7- 5-73	Filed Affidavit of Otis Pratt Pearsall, (atty for Pltff) in support of pltffs request for the issuance of a summons permitting the named deft to answer the complaint within 30 days after service of the summons and complaint.
7- 6-73	Filed pltffs. notice to take depositions of persons named within starting 7-11-73.
7-12-73	Filed affdvt of service of subpoena duces tecum on E. Wellman, R. Daley & S. Perry.
7- 5-73	Filed order allowing pltf. to have Freddi L. Snider serve the summons and complaint. Clerk.
7- 6-73	Filed Order that pltf. be granted leave immediately to issue and serve a Notice of Exam. and to proceed to take testimony of: Robert A. Daly, Elizabeth Wellman, Sheldon Perry and Samuel Cohn for purpose of discovery, etc. Gurfein, J.
7-10-73	Filed stip. and order that without prej. to any of their other rights until July 23, 1973 time is ext. by further order of the Court, all persons shall refrain from any other corp. or person to sell or license any right, etc. So ordered Gurfein, J.
7-16-73	Filed stip. and order that dep. of Sheldon Perry is adj. from July 12, 1973 to July 13, 1973; dep. of Elizabeth Wellman is adj. from July 11, 1973 to July 13, 1973, etc. So Ordered, Gurfein, J.

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PROCEEDINGS

- 7-20-73 Filed CBS's Order to Show Cause that deft. Tandem Prod., Inc. why an order shouldn't be entered and compelling deft. to abide by prov. of stip., Ordered that pending the holding of such hrg, Tandem Prod. shall abide by all prov. of attached stip., etc. So ordered, Stewart, J. ret. on July 23, 1973.
- 7-25-73 Filed affdt. of Samuel C. Cohn; re: as role as negotiator on behalf of Tandem, deft.
- 7-25-73 Filed reply memorandum in support of pltf's. motion for a preliminary injunction.
- 7-25-73 Filed defts. memorandum in opposition to pltf's. motion for a prel. inj.
- 7-25-73 Filed affdt. of Donald Sipes; re: agreement information between CTN & Tandem.
- 7-25-73 Filed affdt. of Frederick Keeling in support of pltf. application for preliminary.
- 7-25-73 Filed memorandum in support of pltf's. motion for a prel. inj.
- 7-25-73 Filed defts. memorandum in opposition to pltf. motion for prel. inj.
- 7-25-73 Filed affdt. of Otis P. Pearsall to seek TRO in action.
- 7-25-73 Filed affdt. of service of James Parver that he served OSC, Affdt. of Willard Block and pltf. Memorandum in support of pltf's motion for prel. inj. on Tandem Prod. Inc. with Mortimer Rosenthal on 7/6/73.
- 7-25-73 Filed memorandum in support of pltf's. motion for a prel. injunction.

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PROCEEDINGS

- 7-25-73 Filed supplemental affdt. of Otis Pearsall in support of motion for preliminary injunction.
- 7-23-73 Filed stipulation and order that all documents, etc. produced by CBS in this matter (excerpts or summaries thereof) shall be deemed confidential Matter.—Gurfein, J.
- 7-23-73 Filed consent order that Shea Gould Climenko and Kramer be substituted as attys. of record in place of Rubin Wachtel Baum and Levin, So ordered Gurfein, J.
- 7-29-73 Filed ORDER that Herbert Yellin is appointed to serve summons and complaint upon CBS, (new deft.) Clerk.
- 7-26-73 Filed plttfs notice of examination of certain witnesses on 8-20-73.
- 7-23-73 Hearing begun and concluded—Trial set for 9-17-73—Stip. of 7-9-73 to continue.
- 7-18-73 Filed copy of summons with affdvt. of service attached, served Alan Horn on 7-9-73 (for Tandem Productions, Inc.).
- 7-23-73 Filed affdvt. of James P. Pettit that he served a Civil subp. in this action on Willard Block on 7-19-73.
- 7-23-73 Filed AMENDED COMPLAINT.
- 7-24-73 Filed summons to join add. party purs. to Rule 19 with affdvt. of service attached, served: Columbia Broadcasting System, Inc. by Leon Rice on 7-23-73.
- 7-30-73 Filed order appointing Herbert Yellin to serve the summons and complaint upon C.B.S.—Clerk

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DATE

PROCEEDINGS

- 7-30-73 Filed order that plttf. serve and file 2nd amended complaint, reflecting the addition of CBS and that a copy of said 2nd amended complaint together with a copy of the summons and a copy of this order be served upon CBS within two days after entry of this order—Gurfein, J. (m/n)
- 7-30-73 Filed stipulation and order that plaintiffs and defendants shall refrain from selling, or licensing, advertising or promoting TV Broadcasts of "All in the Family" until and incl. 9-17-73. Further stipulated that Tandem Productions, Inc. shall authorize CBS to turn over to Viacom Internat'l materials as indicated herein.—Gurfein, J.
- 8- 2-73 Filed plttfs. first request for production of documents by deft. Tandem Productions, Inc. on Aug. 15, 1973.
- 8- 2-73 Filed summons and entered proof of service by Herbert Yellin serving summons and second amended complaint on CBS on Leon Rice.
- 7-30-73 Filed plttf's. second amended complaint.
- 8- 1-73 Filed stip. and order that deft. Tandem Prod. have until Aug. 10, 1973 to respond to plttfs. first request for prod. of docum. by deft. and deft. Tandem Prod. produce those docum. specified in such request on Aug. 15, 1973. So ordered, Gurfein, J.
- 8- 9-73 Filed affdt. of service of Herbert Yellin that he personally served the Order and 2nd Amended Complaint on Tandem Prod. and CBS with George Bellamy, on July 30, 1973.

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PROCEEDINGS

- 8- 7-73 Filed affdt. of service of Sam Shine that he served the 2nd amended complaint on deft. Tandem Prod. on Aug. 3, 1973.
- 8-15-73 Filed Deft. "ANSWER" to Second Amended Complaint.
- 8-15-73 Filed Deft. Tandem Prod. Inc. Response to Request for Production of Documents.
- 8- 8-73 Filed U.S.D.C. Summons served to Hughes Hubbard & Reed, by Burghardt 7/5/73.
- 8-17-73 Filed Pltffs. First Set of Interrogatories to Tandem Productions Inc.
- 8-20-73 Filed Transcript and Hearing dated July 30, 1973.
- 8-20-73 Filed Transcript and Hearing dated July 23, 1973.
- 8-21-73 Filed Stipulation which Columbia Broadcasting System may answer the Second Amended Complaint extended to September 15, 1973, So ordered Gurfein, J.
- 8-24-73 Filed defts. CBS ORDER TO SHOW CAUSE why a protective order shouldn't be entered restricting the use of transcript of any depositions of CBS taken in this action, etc; ORDERED that the deposition of CBS is stayed pending the hearing CBS motion for a protective, etc. Wyatt, J. ret. on: Sept. 5, 1973 in Rm. 2804. m/n
- 8-28-73 Filed Pltffs. Notice of Examination on Sept. 6, 1973.
- 8-31-73 Filed stipulation and order that the time for plaintiffs to move under Fed. R. Civ. P. 12(f) re answer of Tandem Productions, Inc., is extended to Sep. 4, 1973—Wyatt, J.

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PROCEEDINGS

- 8-31-73 Filed Notice of deposition of Samuel C. Cohn, dtd. 9/10/73.
- 9-12-73 Filed stip. and order that all transcripts of depositions of CBS hereafter taken in this action and all documents hereafter produced by CBS will be used only in accordance with all the provisions of the protective order entered herein on July 23, 1973, a conformed copy of which is attached and that this stip. is without prej. to the right of any party to apply to the court to be relieved of any provision of that order with respect to said transcripts and documents. So ordered, Gurfein, J. (w/Judge).
- 9-14-73 Filed by deft. CBS notice of motion for an order that it be dropped as Party and for other relief.—ret. Sep-17-73 at 10 AM.
- 9-14-73 Filed memorandum of law by CBS in support of its motion that it be dropped as Party.
- 9-18-73 Filed deft's. CBS notice of motion for an order dropping CBS from this action and striking Paragraph 21 of the Second Amended Complaint on the ground that CBS has been misjoined or dismissing CBS from this action and directing the other parties to interplead or dismiss action for lack of jurisdiction over subject matter; for an order staying the trial of this action pending determination of CBS's motion described in paragraph (a) hereof or directing a separate trial of the issue raised by Tandem's 5th and 6th defenses not sooner than a reasonable time after a ruling on the motion described in paragraph (a) hereof and pltf's. motion to dismiss Tandem's 5th defense noticed for Sept. 17, 1973 ret. on Sept. 17, 1973.

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PROCEEDINGS

- 9-18-73 Filed ORDER—IT IS ORDERED that CBS shall hold all such property with respect to each episode of the TV program All in the Family, as is necessary to engage in the foreign syndication of that program and in the domestic syndication of that program after the completion of all network broadcasts, including a color video tape, etc, subject to further order of the Court in this action directing CBS to deliver the property to a party herein for foreign syndication or for domestic syndication after the completion of all networks runs; and CBS agrees that it has no interest in the property which is the subject matter of the suit, CBS is dismissee as a party; pltf's. and deft. Tandem shall within days interplead their respective claims with respect to the Property, pltfs. amended complaint may be deemed their interpleader complaint if they so elect and neither pltfs. nor deft. Tandem shall commence any action or assert any claim against CBS with respect to the custody, of the property. Gurfein, J. m/n
- 9-20-73 Trial Cont. 9/17/73, 9/18/73, 9/19/73, 9/20/73, CBS Motion to Dismiss—Granted.
- 10-5-73 Trial cont. and concluded on Oct. 4, 1973. Pltf. submitted testimony and exhibits. Decision reserved. Tom Hughes, Clerk for J. Gurfein.
- 10- 9-73 Filed ORDER—ORDERED that in accordance with the order entered dated Sept. 17, 1973, judgment is directed to be entered dismissing action and the caption of this action shall thereupon be deemed by amended by dropping CBS as a party. Gurfein, J. m/n

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- 10- 9-73 Filed JUDGMENT—ADJUDGED—that pursuant to and in accordance with paragraphs 1, 2 & 4 of said order of Sept. 17, 1973 the action, the second amended complaint and each of the claims asserted therein are dismissed as to CBS on the merits and with prej. Gurfein, J. Judgment entered, Clerk entered on docket 10-11-73. m/n
- 1- 4-74 Filed OPINION #40172. . . . For all the reasons indicated, Viacom is entitled to a declaratory judgment and injunctive relief. Plaintiff may submit an appropriate decree and judgment on notice. The foregoing constitutes the Courts findings of fact and conclusions of law, pursuant to Rule 52a—Gurfein, J. m/n
- 1-18-74 Filed plaintiffs affdvt. and notice of motion for an order dismissing the fifth defense of deft. Tandem P.—ret. 9-17-74.
- 1-18-74 Filed defendant Tandem's Offer of Proof.
- 1-18-74 Filed defendant Tandem's statement pursuant to Rule 9(g).
- 1-18-74 Filed deft. CBS's memorandum in support of the motion of CBS that it be dropped as a party.
- 1-18-74 Filed plaintiffs reply memorandum in support of motion pursuant to Rules 12(c), 12(f), 12(h) (2) and 56.
- 1-18-74 Filed plaintiffs memorandum in support of motion pursuant to Rules 12(c), 12(f), 12(h)(2) and 56.
- 1-18-74 Filed by deft. Tandem, memorandum of law in opposition to plaintiffs' motion to dismiss defendant Tandem's fifth defense.

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DATE	PROCEEDINGS
1-18-74	Filed trial memorandum of defendant Tandem Productions, Inc.
1-18-74	Filed Post trial reply memorandum of deft. Tandem Productions, Inc.
1-18-74	Filed plaintiffs' post trial memorandum.
1-18-74	Filed plaintiffs' memorandum in answer to defendant's post trial memorandum.
1-18-74	Filed correction of opinion #40172 (in footnote 27, delete Ex 138.)—Gurfein, J.
1-24-74	Filed transcript of record of proceedings, dated Oct-4-73.
1-24-74	Filed transcript of record of proceedings, dated Sep 18, 19—1973.
2-25-74	Filed Hearing begun and concluded.—Gurfein, J.
3-14-74	Filed stip. and order that while an appeal by Tandem Productions, Inc. is pending, plaintiffs will not enter into any agreements, etc.—Gurfein, J.
4- 4-74	Pre-trial conference held by Gurfein, J.
4- 8-74	Filed deft's memorandum (Tandem's) in support of counter proposed judgment.
4- 8-74	Filed OPINION #40562 . . . For reasons indicated, Plaintiff will submit on five days' notice a new proposed final judgment based on the foregoing.—Gurfein, J. (Plaintiff's version is accepted) m/n

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PROCEEDINGS

- 4-16-74 Filed FINAL JUDGMENT and order in favor of plaintiffs' permanently enjoining deft. as indicated. Tandem shall pay to pltf. all taxable costs herein. Jurisdiction is retained by Court for the purposes of enforcing compliance herewith.—Gurfein, J. Judgment entered.—Clerk (4-17-74). m/n
- 5- 7-74 Filed defendant's notice of appeal to the USCA for the 2nd Circuit from final judgment entered on 4-17-74—copy mailed to Hughes Hubbard & Reed, Esqs.
- 6- 3-74 Filed affdvt. of Milton S. Gould in opposition to motion of CBS for protective order.
- 6- 3-74 Filed transcript of record of proceedings dated Sept 17-73.
- 6- 3-74 Filed transcript of record of proceedings dated Sept 19-73.
- 6 3-74 Filed transcript of record of proceedings dated Sept. 20-73.
- 6-14-74 Filed deposition of Alan David Yorkin dated 8-22-73.
- 6-14-74 Filed deposition of Willard Block dated July 18-73.
- 6-14-74 Filed continued deposition of Willard Block dated 9-5-73.
- 6-14-74 Filed deposition of Cornelius F. Sullivan Jr. dated 9-11-73.
- 6-14-74 Filed deposition of Martin Perlberger dated Aug 21-73.

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DATE	PROCEEDINGS
6-14-74	Filed deposition of James William Hayes dated Aug 22-73.
6-14-74	Filed deposition of Norman M. Lear dated Aug 20-73.
6-14-74	Filed stipulation that transcripts of depositions of certain persons be made part of the record on appeal.
6-14-74	Filed stipulation that listed items are to be included on the record of appeal.
6-14-74	Filed stipulation that exhibits listed on the annexed "Index of Exhibits" are included in the record on appeal.
6-14-74	Filed deposition of Jerrold Andrew Perenchio dated Aug 23-73.
6-14-74	Filed transcript of record or proceedings dated 2-21-74.
6-17-74	Filed deft's. notice of motion to stay the final judgment pending the appeal. Ret. Feb 19-74.
6-17-74	Filed affdvt. of Charles Tolep in support of pltffs revised proposed final judgment.
6-17-74	Filed affdvt. of A. Jerrold Perenchio in support of defts. counter proposed final judgment.
6-17-74	Filed memorandum of law in support of defts. motion for stay pending appeal.
6-17-74	Filed affdvt. of Arthur Zeiger in support of pltffs. final judgment.
6-17-74	Filed pltffs memorandum in support of revised proposed final judgment.

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DATE	PROCEEDINGS
6-17-74	Filed pltffs memorandum in opposition to defts. motion for relief pending appeal.
6-17-74	Filed affdvt. of Fred. Gilson in opposition to motion.
6-17-74	Filed deposition of Samuel Cohn dtd. July 17, 1973.
6- 6-74	Filed Bill of Costs in the sum of \$4,358.18—docketed as judgment #74,482 (in favor of pltf.)—Clerk.
6-17-74	Filed notice that the record on appeal has been certified and transmitted to the USCA for the 2nd circuit on 6-17-74.

Excerpts from the Affidavit of Willard Block, Dated July 5, 1973, in Support of Plaintiffs' Motion for a Preliminary Injunction: Page 1 from "Willard Block" Through the End of Paragraph 1; Paragraphs 6, 8, 11, 13-16, 25-27 and 40

WILLARD BLOCK, being duly sworn, deposes and says:

1. I am President of the Viacom Enterprises division of plaintiff Viacom International Inc. ("Viacom"). Since March 1971 I have had management responsibility for the entire television syndication business of Viacom and its predecessor CBS Enterprises Inc. ("CBS Enterprises"). Prior to that time I was in charge of CBS Enterprises' international syndication activities.

* * *

6. Viacom was incorporated in August 1970 as a wholly-owned subsidiary of Columbia Broadcasting System, Inc. ("CBS") which has its headquarters and principal executive offices at 51 West 52nd Street, New York City. It was established in response to certain regulations adopted by the Federal Communications Commission ("FCC"), including the regulation adopted on May 4, 1970, in Docket No. 12782, prohibiting television networks from engaging in the business of syndication, 47 C.F.R. §73.658(j) (Supp. 1972). CBS' syndication business for many years had been conducted by its wholly-owned subsidiary, CBS Enterprises. CBS arranged to divest itself of such business through a spin-off transaction (the "spin-off") whereby it would transfer its rights to syndicate programs exhibited over the CBS Television Network ("CBS-TV") to Viacom, merge CBS Enterprises into Viacom, and distribute all of the capital stock of Viacom to the CBS shareholders. The spin-off was effected on June 4, 1971. Since then Viacom, having lost the guiding presence of a large and important parent, has energetically attacked the difficult but vital task of building its own separate destiny.

* * *

Excerpts from the Affidavit of Willard Block

8. Tandem, an entertainment company owned by Norman Lear and Alan Yorkin, for many years has engaged in the production of motion pictures and television programming, and in related activities. Among its other affairs, Tandem is the producer of *ALL IN THE FAMILY* and "*MAUDE*" which are currently broadcast over CBS-TV each week at 8:00 p.m. on Saturdays and at 8:00 p.m. on Tuesdays, respectively.

* * *

11. The Viacom spin-off was originally scheduled to be consummated on December 31, 1970. The FCC, however, on that date stayed the spin-off until June 4, 1971 when it issued an order* approving the transaction and dissolving its stay. Immediately thereafter, on June 4, 1971, the spin-off was consummated with the result that on that date the Syndication Agreement was delivered and became operative, CBS Enterprises merged into Viacom, and Viacom commenced business as a wholly independent, publicly-held corporation.

* * *

13. Following preliminary negotiations and related activities, CBS and Tandem entered into an agreement regarding *ALL IN THE FAMILY* (the "Tandem Agreement") which was memorialized in writing and became effective as of July 10, 1970. Tandem agreed among other things to assign to CBS all of the rights (the "Syndication Rights") it then possessed or thereafter acquired to syndicate *ALL IN THE FAMILY* in the United States and foreign countries at CBS' standard syndication fees (40% foreign, 40% domestic station-by-station, 25% domestic regional, 10% domestic network). Since Tandem thus assigned to CBS all

* *Columbia Pictures Industries, Inc.*, 30 F.C.C. 2d 9 (1971), *aff'd sub nom., Jacopi v. FCC*, 451 F.2d 1142 (9th Cir. 1971).

Excerpts from the Affidavit of Willard Block

such rights, whenever it might obtain them from the owners of "Till Death Us Do Part" or otherwise, the purpose and effect of the Tandem Agreement was to enable CBS to enjoy any and all such rights exclusively. CBS agreed among other things to pay Tandem all net profits derived from exercise of the Syndication Rights after deduction of its syndication fees and all distribution expenses. The Tandem Agreement further provided that CBS was entitled to assign its rights in full or in part to any person, firm or corporation provided that no such assignment would relieve CBS of its obligations thereunder.

14. In January 1971, CBS-TV commenced broadcasting ALL IN THE FAMILY. Since ALL IN THE FAMILY was thus initially broadcast over CBS-TV during the 1970-71 season Viacom, upon delivery of the Syndication Agreement on June 4, 1971 and pursuant to its terms, became the sole owner of the Syndication Rights and entitled to the exclusive enjoyment thereof on and after that date. This, of course, in no way deprived Tandem of its profit participation in the Syndication Rights. All of the net proceeds derived by Viacom from exercise of the Syndication Rights after deduction of Viacom's distribution fees and costs are, in effect, payable to Tandem since under the Tandem Agreement CBS was to pay to Tandem an amount equivalent to that which under the Syndication Agreement Viacom was to pay to CBS.

15. When in January 1971 CBS-TV commenced broadcasting ALL IN THE FAMILY, simultaneously released the program to CBS Enterprises for foreign syndication. However, CBS did not divulge, nor at that early stage of network exhibition did it have any reason to divulge, to CBS Enterprises that it had acquired the domestic as well as foreign syndication rights from Tandem. Not until December 1971 did Viacom learn that CBS had ac-

Excerpts from the Affidavit of Willard Block

quired the domestic syndication rights and that Viacom was entitled thereto as assignee under the Syndication Agreement.

16. Upon release of *ALL IN THE FAMILY* for foreign syndication in January 1971, CBS Enterprises promptly organized an international sales and promotion campaign which it pursued until the spin-off on June 4, 1971. From that date to the present time Viacom, as assignee of the Syndication Rights and successor by merger to CBS Enterprises, directly and through its International Subsidiaries, has diligently and vigorously pressed and expanded this campaign. Although hampered by Tandem's failure to secure prompt clearance from the owners of the British rights for the principal foreign markets and Tandem's special requirements concerning consultation on individual sales, the efforts of CBS Enterprises and Viacom have met with success. As shown by the listing submitted herewith as Exhibit E, episodes of *ALL IN THE FAMILY* have been sold to no fewer than 50 broadcasters in 14 foreign countries and territories.

* * *

25. There can be no question but that *ALL IN THE FAMILY* is a unique television series, and that the exclusive right to syndicate *ALL IN THE FAMILY* worldwide is a unique and exceptionally valuable property right. *ALL IN THE FAMILY* is the first of a kind. Controversial and fearless, it examines bigotry and other usually-avoided subjects with a realism never before screened in American homes. It has made America laugh at the deep-seated failings of its cultural heritage and, in so doing, has fully justified the unprecedented outpouring of critical acclaim that it received.

26. Illustrative of the commentary on *ALL IN THE FAMILY* are articles which appeared in *The New York Times* on

Excerpts from the Affidavit of Willard Block

February 21, 1971, in T.V. Guide on February 27, 1971, in the Santa Monica Evening Outlook on February 27, 1973 and in the Chicago Tribune on June 17, 1971, copies of which are submitted herewith as Exhibits G H, I and J, and the review reprints submitted herewith as Exhibit K. The feeling about ALL IN THE FAMILY is perhaps best caught by two of America's most widely respected television critics, Jack Gould of The New York Times and Cleveland Amory of T.V. Guide. Jack Gould wrote:

"Prejudicial epithets always make a civilized soul squirm in discomfort and wish they would go away. But, unfortunately, such is not the case. No matter how much TV or other media attempt to suppress them they do exist. Except for 'All in the Family,' it is difficult to recall another TV attempt to bring the disease out into the open with the aim, one hopes, of applying the test of corrective recognition and humor.

* * *

"It is easy to misunderstand 'All in the Family,' to concentrate on Archie's disparagement of practically everyone around him. The larger lesson is that he is continually a loser, always a bit more frustrated than before.

* * *

"* * * Some of Archie's words may chill the spine, but to root out bigotry has defied man's best efforts for generations and the weapon of laughter just might succeed. The possibility entitles 'All in the Family' to a chance." (Exhibit G)

And hailing the program's advent Mr. Amory wrote in T.V. Guide:

"All in the Family is not just the best-written, best-directed and best-acted show on television, it is

Excerpts from the Affidavit of Willard Block

the best show on television. It is also a landmark show—a complete breakthrough—one which opens up a whole new world for television and has already made the old world seem so dated that we very much doubt that any new program, from here on in, will ever be quite the same again. We realize these are strong statements. But then so is the series. And the remarkable thing about it is that it has done all this by just one simple thing: it has added to the everlasting, everloving, everlaughing, everboring family situation comedy just one secret ingredient—prejudice. There have been documentaries about this, and dramas. But now you have it in prime-time comedy, not only shown up for what it is but also faced, for the first time, by the one force which will surely in the end overcome it—humor.” (Exhibit H)

27. ALL IN THE FAMILY’s early success has proved durable. As shown by the list submitted herewith as Exhibit L, the show has won honor after honor. And perhaps even more important, as shown by the schedule submitted herewith as Exhibit M, the show has for more than two years consistently ranked at the top of the national ratings.

• • •

40. At the time of spin-off Viacom’s inventory of programs available for immediate or future syndication consisted almost entirely of CBS properties covered by the Syndication Agreement. While Viacom over the past two years has taken great strides toward diversification of its inventory, product development is a long-term proposition and the fact remains that today a very substantial part of Viacom’s syndication business is dependent upon the rights assigned by CBS to Viacom under the Syndication Agreement.

• • •

**Plaintiffs' Notice of Examination, Dated
July 6, 1973, and Exhibit Thereto**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

VIACOM INTERNATIONAL INC., *et al.*,
Plaintiffs,
against
TANDEM PRODUCTIONS, INC.,
Defendant.

SIRS:

PLEASE TAKE NOTICE that plaintiffs will take the depositions upon oral examination pursuant to Rules 26 *et seq.* of the Rules of Civil Procedure for the United States District Courts, before a notary public or other person qualified to administer oaths, for the purpose of discovery and for use as evidence in this action, of the following persons at the following times:

Robert A. Daly, Vice President, Business Affairs, Columbia Broadcasting System, Inc. ("CBS"), at 9:30 A.M., July 11, 1973;

Elizabeth Wellman, Manager of Syndication, CBS, at 2:00 P.M., July 11, 1973;

Plaintiffs' Notice of Examination

Sheldon Perry, Director of Program Negotiation,
CBS, at 9:30 A.M., July 12, 1973; and

Samuel C. Cohn, of Creative Management Associates,
Inc., at 2:00 P.M., July 12, 1973.

The foregoing depositions shall be conducted at the offices of Hughes Hubbard & Reed, One Wall Street, 26th Floor, New York, New York 10005, commencing at the times specified above and continuing from day-to-day until completed.

Each witness will be required to produce at the time of the examination the materials listed on the exhibit hereto.

Dated: New York, New York
July 6, 1973

Yours, etc.

HUGHES HUBBARD & REED

By Otis Pratt Pearsall

A Member of the Firm
Attorneys for Defendant
Viacom International Inc.
Office and P.O. Address
One Wall Street
New York, New York 10005

Plaintiffs' Notice of Examination

EXHIBIT A TO JUDICIAL SUBPOENA
DUCES TECUM

1. All agreements entered into between Columbia Broadcasting System, Inc. ("CBS") and Tandem Productions, Inc. ("Tandem"), Norman Lear or Alan Yorkin during the period from January 1, 1970 through August 31, 1971 concerning in any way the programs or program series entitled "ALL IN THE FAMILY", "THOSE WERE THE DAYS", or "TILL DEATH US DO PART" (collectively the "Programs"); and

2. All correspondence, communications, memoranda, notes, drafts and other writings reflecting or relating to discussions, proposals, negotiations or agreements made or had during the period from January 1, 1970 through August 31, 1971 as to arrangements between CBS and Tandem, Norman Lear or Alan Yorkin concerning any of the Programs.

**Deposition Subpoena *Duces Tecum*, Dated July 6, 1973,
to Sheldon Perry, and Exhibit A Thereto**

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

To SHELTON PERRY
51 West 52nd Street
New York, New York

YOU ARE COMMANDED to appear at the offices of Hughes Hubbard & Reed One Wall Street, 26th Floor, New York, New York in the city of New York on the 12th day of July, 1973, at 9:30 o'clock A.M. to testify on behalf of plaintiffs at the taking of a deposition in the above entitled action pending in the United States District Court for the Southern District of New York and bring with you the materials described in Exhibit A annexed hereto.

Dated July 6, 1973.

HUGHES HUBBARD & REED
Attorneys for Viacom International Inc.
One Wall St., N.Y., N.Y.

RAYMOND F. BURGHARDT
Clerk.

By E. BECKER
Deputy Clerk.

Any subpoenaed organization not a party to this suit is hereby admonished pursuant to Rule 30 (b) (6), Federal

Deposition Subpoena Duces Tecum

Rules of Civil Procedure, to file a designation with the court specifying one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and shall set forth, for each person designated, the matters on which he will testify or produce documents or things. The persons so designated shall testify as to matters known or reasonably available to the organization.

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**Deposition Subpoena *Duces Tecum*, Dated July 6, 1973,
to Robert A. Daly, and Exhibit A Thereto**

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

To ROBERT A. DALY
51 West 52nd Street
New York, New York 10019

YOU ARE COMMANDED to appear at the offices of Hughes Hubbard & Reed, One Wall Street, 26th Floor, New York, New York in the city of New York on the 11th day of July, 1973, at 9:30 o'clock A.M. to testify on behalf of plaintiffs at the taking of a deposition in the above entitled action pending in the United States District Court for the Southern District of New York and bring with you the materials described in Exhibit A annexed hereto.

Dated July 6, 1973.

HUGHES HUBBARD & REED
Attorneys for Plaintiffs
One Wall St., N.Y., N.Y.

RAYMOND F. BURGHARDT
Clerk.

By E. BECKER
Deputy Clerk.

Any subpoenaed organization not a party to this suit is hereby admonished pursuant to Rule 30 (b) (6), Federal

Deposition Subpoena Duces Tecum

Rules of Civil Procedure, to file a designation with the court specifying one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and shall set forth, for each person designated, the matters on which he will testify or produce documents or things. The persons so designated shall testify as to matters known or reasonably available to the organization.

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**Deposition Subpoena *Duces Tecum*, Dated July 6, 1973,
to Elizabeth Wellman, and Exhibit A Thereto**

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

TO ELIZABETH WELLMAN
51 West 52nd Street
New York, New York 10019

YOU ARE COMMANDED to appear at the offices of Hughes Hubbard & Reed, One Wall Street, 26th Floor, New York, New York in the city of New York on the 11th day of July, 1973, at 2:00 o'clock P.M. to testify on behalf of plaintiffs at the taking of a deposition in the above entitled action pending in the United States District Court for the Southern District of New York and bring with you the materials described in Exhibit A annexed hereto.

Dated July 6, 1973.

HUGHES HUBBARD & REED
Attorneys for Plaintiffs
One Wall St., N.Y., N.Y.

RAYMOND F. BURGHARDT
Clerk.

By E. BEDAN
Deputy Clerk.

Any subpoenaed organization not a party to this suit is hereby admonished pursuant to Rule 30 (b) (6), Federal

Deposition Subpoena Duces Tecum

Rules of Civil Procedure, to file a designation with the court specifying one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and shall set forth, for each person designated, the matters on which he will testify or produce documents or things. The persons so designated shall testify as to matters known or reasonably available to the organization.

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2. All correspondence, communications, memoranda, notes, drafts and other writings reflecting or relating to discussions, proposals, negotiations or agreements made or had during the period from January 1, 1970 through August 31, 1971 as to arrangements between CBS and Tandem, Norman Lear or Alan Yorkin concerning any of the Programs.

**Deposition Subpoena *Duces Tecum*, Dated July 6, 1973,
to Samuel C. Cohn, and Exhibit A Thereto**

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

[SAME TITLE]

To **SAMUEL C. COHN,**
Creative Management Associates, Inc.
600 Madison Avenue
New York, New York

YOU ARE COMMANDED to appear at the offices of Hughes Hubbard & Reed, One Wall Street, 26th Floor, New York, New York in the city of New York on the 12th day of July, 1973, at 2:00 o'clock P.M. to testify on behalf of plaintiffs at the taking of a deposition in the above entitled action pending in the United States District Court for the Southern District of New York and bring with you the materials described in Exhibit A annexed hereto.

Dated July 6, 1973.
HUGHES HUBBARD & REED
Attorneys for Viacom International Inc.
One Wall St., N.Y., N.Y.

RAYMOND F. BURGHARDT
Clerk.

By **E. BECKER**
Deputy Clerk.

1. Strike the words "and bring with you" unless the subpoena is to require the production of documents or tangible things, in which case the documents and things should be designated in the blank space provided for that purpose. If testimony by an organization representative or designee is requested, describe with reasonable particularity the matters on which examination is requested.

Deposition Subpoena Duces Tecum

Any subpoenaed organization not a party to this suit is hereby admonished pursuant to Rule 30 (b) (6), Federal Rules of Civil Procedure, to file a designation with the court specifying one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and shall set forth, for each person designated, the matters on which he will testify or produce documents or things. The persons so designated shall testify as to matters known or reasonably available to the organization.

RETURN ON SERVICE

Received this subpoena at New York, New York, on July 6, 1973 and on July 9, 1973 at 600 Madison Avenue, New York, N.Y. served it on the within named Samuel C. Cohn by delivering a copy to him and tendering to him the fee for one day's attendance and the mileage allowed by law.²

Dated: July 10, 1973

By

Service Fees

Travel	\$ 5
Services	20
Total	\$25

Subscribed and sworn to before me, a notary public this 10th day of July 1973.

.....

NOTE.—Affidavit required only if service is made by a person other than a United States Marshal or his deputy.

2. Fees and mileage need not be tendered to the witness upon service of a subpoena issued in behalf of the United States or an officer or agency thereof. 28 USC 1825.

Deposition Subpoena Duces Tecum

EXHIBIT A TO JUDICIAL SUBPOENA
DUCES TECUM

1. All agreements entered into between Columbia Broadcasting System, Inc. ("CBS") and Tandem Productions, Inc. ("Tandem"), Norman Lear or Alan Yorkin during the period from January 1, 1970 through August 31, 1971 concerning in any way the programs or program series entitled "ALL IN THE FAMILY", "THOSE WERE THE DAYS", or "TILL DEATH US DO PART" (collectively the "Programs"); and

2. All correspondence, communications, memoranda, notes, drafts and other writings reflecting or relating to discussions, proposals, negotiations or agreements made or had during the period from January 1, 1970 through August 31, 1971 as to arrangements between CBS and Tandem, Norman Lear or Alan Yorkin concerning any of the Programs.

31a

Consent to Change Attorneys

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

IT IS HEREBY CONSENTED that Shea Gould Climenko & Kramer be substituted as attorneys of record for the undersigned in the above-entitled action in the place and stead of the undersigned attorneys, as of the date hereof.

Dated: New York, New York
July 16th, 1973

TANDEM PRODUCTIONS, INC.

By A. Jerrold Pevenchio

RUBIN WACHTEL BAUM & LEVIN

By Gerald Harris

SHEA GOULD CLIMENKO & KRAMER

By Martin I. Shelton

SO ORDERED: July 23, 1973

s/ M. I. Gurfein
U.S.D.J.

(Verified by Joel I. Papernik on July 16, 1973.)

**Affidavit of Bernard D. Fischman Annexed to
Consent to Change Attorneys**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New York)
County of New York) ss.:

BERNARD D. FISCHMAN, being duly sworn, deposes and
says:

1. I am a member of the firm of Shea Gould Climenko
& Kramer.

2. Tandem Productions, Inc., defendant in the above
entitled action, has requested that we be substituted as
counsel to it in place of Rubin Wachtel Baum & Levin. As
indicated on the attached Consent, we and Rubin Wachtel
Baum & Levin have agreed to the requested substitution.

3. A hearing on the plaintiffs' request for a prelimi-
nary injunction is scheduled to be held on July 23, 1973.
Depositions are presently being conducted in the action.

BERNARD D. FISCHMAN

Bernard D. Fischman

(Sworn to July 18, 1973.)

33a

TRANSCRIPT OF HEARING, JULY 23, 1973
(Transcript, pages 2-17)

1 rmp

2 THE COURT: Gentlemen, I want to hear argument,
3 first, from the plaintiff as to why CBS is not an indispensable
4 party under Rule 19(h).

5 MR. PFARSALL: Very well, your Honor.
6 There are two reasons, your Honor. The initial contention
7 that the defendant puts forward is that CBS has an interest
8 in the proceeding on two grounds: the first ground is
9 that they are charged in the complaint with having breached
10 an agreement between Viacom and CBS. There is an allegation
11 in the original complaint filed in this action that Tandem
12 has induced a breach of CBS and the contention by Tandem
13 is that the party charged with a breach of a contract is
14 an indispensable party.

15 Your Honor, as to that point, we disagree, but
16 on Saturday, upon receiving these parties, we concluded it
17 was certainly not worth your Honor's time to try and resolve
18 and we amended the complaint to delete entirely the count
19 having to do with the breach.

20 The fact of the matter, your Honor, is that Viacom
21 has no quarrel whatever with CBS. They were notified by
22 Tandem if they provided the tapes to us it would be at their
23 own risk and if the heat were taken off CBS, they
24 would resume the practice they had for the last three
25 years of providing the tapes to us. We have no quarrel with

1
2 CBS and have eliminated that count from the complaint filed.
3 on Saturday, your Honor.

4 So far as that portion of the complaint is
5 concerned, I don't think it had any merit, to begin with,
6 but regardless of its merit, it is out of the picture.

7 THE COURT: You may not think so, but I think
8 it has a great deal of merit.

9 MR. PEARSALL: May I give your Honor a copy of
10 our amended complaint (handing).

11 THE COURT: Do we have a copy of the Federal
12 Rules --

13 MR. GOULD: That is on page 10 of our memorandum,
14 your Honor, 19(a).

15 THE COURT: Let's get for the record: CBS is a
16 New York corporation?

17 MR. PEARSALL: Yes, your Honor.

18 THE COURT: And it has its principal place of
19 business in New York?

20 MR. PEARSALL: Yes, your Honor.

21 THE COURT: Is it conceded that if CBS were
22 joined as a party defendant, that there would be a lack of
23 diversity of citizenship?

24 MR. PEARSALL: Not at all, your Honor, the problem
25

pp

being this, that under the rules and all the law we have been able to find -- by the way, your Honor, we have served this morning a brief in reply to all of the points which the defendant has raised and I would like to hand up that to your Honor.

THE COURT: Why didn't you give it to me at 9 o'clock?

MR. PEARSALL: Because we got it late Friday afternoon and worked on it all weekend long and we have only just been able to produce it. It was a substantial feat, achieving it over the weekend.

THE COURT: You get no medals unless you get it to my chambers at 9 o'clock.

MR. PEARSALL: Your Honor, on page 9 we have assembled the authority which established that where there is no controversy between the party who is determined to be indispensable and the party with whom it is aligned against diversity would be destroyed, that in that event the Court has the authority to align the indispensable party --

THE COURT: Of course, but if it is a party.

MR. PEARSALL: The point is, CBS can be joined as an involuntary plaintiff or as a defendant and if joined as a defendant, can be realigned as a plaintiff in accordance with its actual interest.

1 RP

2 THE COURT: No question about that, but the
3 question is, you have not joined them. How can a Court
4 join a party? I can't serve process.

5 MR. PEARSALL: Let's take this a step at a time,
6 if I can. First of all, your Honor, as to this question
7 or whether or not they are an indispensable party, to
8 begin with --

9 THE COURT: That is all I asked, at the moment.

10 MR. PEARSALL: On that one point, they are not,
11 and the reason is that the only substantial basis put
12 forward by the defendant in support of that proposition has
13 been deleted from the complaint and from the case. There
14 is no charge in this case at this time that CBS breached a
15 contract or has in any way committed a wrong.

16 THE COURT: The question is not what is in the
17 complaint but what would be in the judgment. That is what
18 you test by, as I understand the law. You test it by the
19 various factors and that is why I asked for the rule, to
20 see to what extent a judgment rendered in the person's
21 absence might be prejudicial to him and the extent to which
22 by protective divisions in the judgment by the shaping of
23 relief or other measures, a prejudice may be lessened or
24 avoided and whether a judgment rendered in the person's
25 absence will be adequate and whether the plaintiff has

an adequate remedy if the action is dismissed.

MR. PEARSALL: First of all, there is no claim. CBS has no interest whatever and claims none in these rights. There is no claim CBS has an interest in the rights or that it has assigned to --

THE COURT: Suppose I say that you should get the rights rather than Tandem and CBS says, "That is very nice. I wasn't there. I am not going to give you that negative"?

MR. PEARSALL: CBS has not taken that position. We have CBS witnesses today and we will establish whether or not --

THE COURT: If you say they can be aligned as a party plaintiff, I don't understand why you don't join them.

MR. PEARSALL: The point is this, your Honor: this is a dispute between Tandem and Viacom. CBS has no interest in this controversy whatsoever.

THE COURT: But I have to be able to bind them by a judgment.

MR. PEARSALL: You don't have to, your Honor. There is no showing and there will be no showing that CBS will do anything to breach its contract if you restrain Tandem from interfering with our contractual relations.

THE COURT: Suppose that the defendants' claim is found by me to be correct, that aside from the Federal

1
2 Trade Commission's ruling there was an inherent violation
3 of the antitrust laws by virtue of the tie-in, or whatever
4 you might call it, and that therefore CBS's rights were
5 obtained by coercion? Don't you think that will affect
6 CBS with respect to all the other rights which they assigned
7 at the same time to Viacom in a spinoff?

8 MR. PEARSALL: That determination will not be
9 binding upon CBS and, more specifically, in this particular
10 situation we are dealing with now, the preliminary injunction,
11 the rule is perfectly clear that it is no defense to an
12 action on a contract, and we have cited to you the authorities
13 in the brief we have provided to you today -- that it is no
14 defense in an action on a contract that by reference to
15 extrinsic proof some additional further antitrust violation
16 can be established.

17 I think the Supreme Court has been quite clear on
18 this, as has been this circuit --

19 THE COURT: Bruce's Juices, you are talking about?

20 MR. PEARSALL: Yes.

21 THE COURT: I think it is not quite so clear here.

22 MR. PEARSALL: The rule works this way, your
23 Honor: if the economic transaction is intelligible in itself
24 and is itself not violative of law, which is the granting of
25 syndication rights -- there is nothing unlawful about the

granting of syndication rights. What happens here, your Honor, is that there is an allegation that CBS, by reason of its market position, its power with respect to the entire industry, has been able to exercise restraint in this particular situation, and there is no violation here on the contract provision without proof of the entire monopolization situation.

THE COURT: You can have a tie-in without complete proof of monopolization, I would think.

MR. PEARSALL: Your Honor, I understand about tie-ins, and I suppose that if proof could be established here that this has in fact occurred, then possibly there would be a problem on the face of this agreement, but in terms of the record as it now stands, we are dealing with a complete hypothetical that has been forward by defendant. It would appear to me the basis of the claim here is that CBS has had a practice --

THE COURT: I am coming back to ask you a question again: why do you object to having CBS in the case?

MR. PEARSALL: We want to be in as simple a contract case as we can get. We don't want to have to contend with a lot of complexity. Viacom does not want to go to the additional expense of litigating a more complicated procedure. We could see no reason, when we decided who we

would sue, why we would sue CBS --

THE COURT: CBS, if you call it a stakeholder, has to know whom to give the negative to to make copies.

MR. PEARSALL: Your judgment will resolve that.

THE COURT: They can say, "Tandem is enjoined, but we are not going to give Viacom a thing."

MR. PEARSALL: We don't make a claim against CBS, your Honor. This is a pure hypothesis, a speculation.

THE COURT: It is a common thing that happens when you have an exclusive license agreement. Where you have a licensor and an exclusive license and a third party claims a right to the same license, then it seems to me that the plaintiff has to determine that the stakeholder or the licensor or the assignor is an indispensable party.

MR. PEARSALL: Were the proof in this case to show that CBS needed to be bound, there is no question but that your Honor has power under Rule 65(d), to bind anybody found to be in concert with the person who is to be restrained. Rule 65(d) on its face so provides, but I am saying this is not a necessary position to take because as a practical matter CBS has made no claim with respect to the property as stakeholder, has not contended in any way that if Viacom's rights versus Tandem's rights are established that it will continue to refuse --

mp

THE COURT: You are making an argument that they should be realigned as a plaintiff, and I agree with that, I think. I would be inclined to say that CBS is a proper party plaintiff here and it would not defeat diversity, but I can't bring them in and if you don't want to do it, I may have to dismiss you.

MR. PEARSALL: We don't consider them indispensable --

THE COURT: It is what I consider, not what you consider.

MR. PEARSALL: If you consider them indispensable in these circumstances, we will bring them in and ask that they be aligned as a party plaintiff.

THE COURT: I will hear from CBS. Are they here?

MR. GLEASON: I am really here at the present moment on another matter and only because your Honor asked me to stay around --

THE COURT: That is why I asked you to stay around.

MR. GLEASON: I am not sure I am in a position to respond to the questions put.

THE COURT: You can go to the phone, but I want to ask you: does CBS have any objection to being joined as a party plaintiff in this action provided that if it doesn't feel like doing anything or spending any money, it doesn't

1 mp
2 have to?

3 MR. GLEASON: I think CBS, as best I can tell,
4 would prefer with respect to this matter and every other
5 matter, to stay out of litigation.

6 THE COURT: First you say you are not prepared,
7 you came on another matter, and then you give me an answer
8 without using the telephone, as I suggested, and I don't
9 appreciate it.

10 MR. GLEASON: It is my understanding as to CBS --

11 THE COURT: Your understanding is unimportant to
12 me if you have no authority. Go out and make a phone call,
13 try to explain the situation, and I will go into the back
14 room and read the brief that has been given to me on in-
15 dispensable parties.

16 MR. PEARSALL: May I ask one further point, your
17 Honor? It is my understanding of the law that even if
18 CBS is unwilling to appear voluntarily as a plaintiff in
19 this matter, Viacom can bring CBS in as an involuntary
20 defendant and your Honor --

21 THE COURT: There is no doubt about it. I want to
22 proceed today and if they agree today -- you might explain
23 that too, that whether they like it or not they can be sub-
24 poened and served, and everything else. The question simply
25 is in order to expedite the hearing would they be willing to

1 mp

Hearing, July 23, 1973

44 a 12

2 enter an appearance today. If not, then I will have to say
3 the marshal will go out and serve them and they will be here
4 anyhow.

5 I will give you ten minutes or so and come back.

6 MR. GOULD: Your Honor, Mr. Pearsall said they
7 dropped one count. Which count was it?

8 MR. PEARSALL: 4.

9 THE COURT: Well, you discuss that with them.
10 You don't need me for that.

11 (Recess.)
12
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14
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SOUTHERN DISTRICT COURT REPORTERS

UNITED STATES COURT HOUSE

FOLLY SQUARE, N.Y., N.Y. 10007 TELEPHONE: CORTLAND 7-4580

THE COURT: Is Mr. Gleason ready to report?

Did he come back?

MR. PEARSALL: I will check him, your Honor. He is still on the telephone, your Honor, but he says that he is coming right away.

THE COURT: All right.

Do you want to make an anticipatory argument, Mr. Gould, if I decide, as I indicate I probably will, to realign CBS as the plaintiff?

MR. GOULD: Well, your Honor has virtually anticipated most of what I have to say. But there is one other aspect.

THE COURT: I mean, do you object to their realignment as a plaintiff? It is really a gag in a sense. The question is, do you want to be in a federal court or do you want to be in a state court?

MR. GOULD: I object to that. I think it is an artificial treatment of it. I do object to their being reassigned as a plaintiff. I think they are really defendants in the case.

THE COURT: The question is really, do you to be in a federal court or would you rather be in a state court?

MR. GOULD: I do not want to confer

jurisdiction on this court.

THE COURT: You cannot confer jurisdiction.

MR. GOULD: But this is a way of doing it, your Honor.

THE COURT: Of course it is, and properly so, unless you can show me it is not proper.

MR. GOULD: I am not suggesting any impropriety in it.

THE COURT: No, no.

MR. GOULD: I will not consent to it.

THE COURT: All right. You do not consent. But you have got to give me a reason --

MR. GOULD: I just want to add one thing in response to what Mr. Pearsall says.

THE COURT: Let us hear from Mr. Gleason first. It may save some time.

MR. GLEASON: Your Honor, to answer the question directly, as to whether or not CBS would like to be a party --

THE COURT: Not if they would like to be.

MR. GLEASON: The answer is no. However, in light of the litigation, CBS is willing to deliver the tapes and whatever other properties are involved in the matter to whomever the Court decides is entitled to them.

2 We find ourselves somewhat as a stakeholder in
3 the matter. We do not see how we have much to gain one
4 way or the other and think that by so doing we can avoid
5 the need of becoming involved in some serious questions and
6 yet give relief to the parties that are before the Court.

7 THE COURT: Well, let me make another suggestion,
8 then: I think that as far as domestic syndication is
9 concerned, we are obviously not going to have to plow through
10 a hot summer worrying about that, since All in the Family
11 is doing so well on network. So you only have a problem,
12 as I see it -- and if I am wrong, correct me as I go along
13 -- on foreign rights. Is that right?

14 MR. PEARSALL: That is in fact the most
15 immediate problem.

16 THE COURT: It is the only immediate problem.

17 MR. PEARSALL: It is not necessarily the
18 only immediate problem, but is certainly the most immed-
19 iate problem.

20 THE COURT: Why?

21 MR. PEARSALL: I am informed by my people
22 that the show has now been on the air sufficiently long
23 so that there are enough episodes collected so that it can
24 be pre-sold, which is a system of selling to domestic
25 stations subject to release at a future date when the show

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2 goes off the air. This is the way in which both the
3 syndicator and the stations can make a judgment today about
4 what the market value is going to be in the future. Maybe
5 today's price is better than then.

6 THE COURT: What I was going to suggest is this:
7 I think this is a case, as I look at it, that really requires
8 the full treatment, in a sense, and I should think that under
9 the rules which permit a joinder of the temporary injunction,
10 the preliminary injunction and the final injunction, that
11 should be done.

12 My suggestion would be that since nothing
13 is burning here, I really do not see anything burning,
14 that the whole thing should be put over to September,
15 the standstill agreement that nobody does anything about
16 foreign or domestic. Domestic, I think, will fall by the
17 wayside, anyhow.

18 As to foreign, I do not know what is so hot
19 about this thing that the money of August is going to make
20 or break either side.

21 MR. PEARSALL: Your Honor, we have brought a
22 witness in last night from London to explain that exact
23 fact to you today. He has to go back tonight because he
24 has had a long-standing appointment to have a cast removed
25 in London by his surgeon tomorrow. He wants to keep that

appointment. He is in the courtroom today.

THE COURT: You sound like a litigator.
I want to talk to a businessman for the moment.

MR. PEARSALL: He is a businessman and can
tell you the problem.

THE COURT: Where is he? Bring him over.

MR. PEARSALL: Mr. Karshan.

THE COURT: You can swear the witness and I will
take this out of order in case we proceed.

HOWARD KARSHAN, called as a witness by the
plaintiff, being first duly sworn, testified as
follows:

THE COURT: Now, address yourself to this
limited subject that I asked you about, if you will.

THE WITNESS: Yes.

Your Honor, we have been selling All in the
Family in Europe.

THE COURT: Who is "we"?

THE WITNESS: Viacom -- well, there are two
companies involved.

THE COURT: Whom do you work for?

THE WITNESS: I work for Viacom International,
Limited and Viacom S.A. One is a United Kingdom corpor-
ation, and one is a Swiss corporation.

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TRANSCRIPT OF HEARING, JULY 23, 1973
(Transcript, pages 33-36, 36a, 37-40, 40a, 41-52, 52a, 55-58)

THE COURT: Of All In The Family?

MR. GOULD: All In The Family.

THE COURT: Give me Europe.

MR. GOULD: They sold \$4400 in Europe; \$79,000 in England. They said that they made \$16,000 on it.

They had a loss in certain areas, and they said that the total amount due to the producer was \$17,000.

What is all this stuff about, this huge economic loss?

THE WITNESS: That's not what I'm saying. If I could just finish this addition, I will give you the figures. It will be an approximation.

MR. GOULD: Can't we just get him to verify this? These are his figures. That's what I am reading from.

THE WITNESS: I have approximately, give or take \$10,000, \$140,000 in my area.

THE COURT: All right. He probably knows. All right. I will accept his figures.

You may step down.

(Witness excused.)

MR. PEARSALL: Your Honor, I just want to point out --

THE COURT: No, I am going to address myself to the indispensable party.

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Hearing, July 23, 1973

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This is a case in which the plaintiff Viacom is a successor to one of the CBS affiliates that was engaged in distribution and syndication of television programs. Viacom came into being as a result of a spinoff to the shareholders of CBS. CBS assigned to Viacom its foreign syndication and its domestic syndication rights, which it had for programs already in being, with the addition of programs that would be shown on the 1970-1971, 1971-1972, I believe, programs.

All In The Family was purchased by Tandem Productions, the defendant, from some English owners of a television series, and after failing to sell it by means of a pilot to ABC, it was successful in selling it to CBS. Apparently the oral arrangement, reflected in a memorandum, was some time in June of 1970.

Thereafter, the Federal Communications Commission barred domestic syndication by networks from September 1, 1971, and subsequently, as I recall, it extended to October 1, 1971 --

MR. PEARSALL: Your Honor, a footnote. The Second Circuit, in the Mansfield case, stayed the effective date of the financial interest rule until 30 days following the mandate coming down. The mandate came down on June 23, 1971, and the financial interest rule took effect on July 23,

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Hearing, July 23, 1973

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1971.

THE COURT: I am not trying to cover the whole thing, I am just trying to give the framework.

MR. PEARSALL: All right.

THE COURT: Subsequently, it was provided that there was a stay of certain matters affecting financial interest. Be that as it may, the CBS decided, contrary to the opposition that was voiced by NBC and ABC in the FCC, to spinoff these rights, as I have indicated, in an existing contract and in certain forthcoming television programs.

Let me say parenthetically that the Federal Communications Commission approved the spinoff, recognizing exactly what CBS was trying to do, and Viacom then became a viable entity in its own. Purportedly also being the assignee of the rights of CBS in all of these foreign syndication and domestic syndication rights.

Thereafter, Viacom apparently began to exercise its rights in foreign distribution, apparently without any protest by Tandem as far as we can assume for the moment.

There did come a time, however, when apparently CBS suggested that Tandem and Viacom get together to see if they could formulate a basis of agreement for the exploitation of these rights. I cannot say whether that involved merely foreign syndication, foreign distribution, or whether

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1 it also involved domestic syndication, but it is not im-
2 portant. The point is that there resulted from these
3 negotiations an impasse so that Tandem took the position
4 that it still owned the syndication rights; and that, for
5 one reason or another, CBS had no distribution rights in
6 domestic syndication or, indeed, in foreign syndication.
7 The impasse resulted apparently from CBS becoming frightened
8 or desirous of cottoning to one of its best producers,
9 Tandem.

11 In any event, it seems undisputed that CBS there-
12 upon refused to surrender the negatives and the tapes which
13 were required for the making of 16 millimeter prints and
14 tapes necessary for television broadcasts.

15 It is obvious that Viacom is unable to fulfill
16 its obligation because of the attitude of CBS. It is also
17 obvious that all that Viacom has are rights which derive from
18 CBS.

19 I, therefore, must face the problem raised by
20 Tandem as to whether or not -- and I do not like the label
21 myself -- as to whether or not CBS is an indispensable party
22 to the action.

23 In order to be practical, we have to concede at the
24 outset that if CBS is a necessary party and becomes a party
25 defendant, there will be a lack of diversity of citizenship.

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2 I will pause here to ask, is there any counsel who
3 denies that or wishes to challenge that statement?
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Accordingly, if CBS is not a party, we must face the question of whether the Court should determine that the case should not proceed. CBS has been asked this morning whether or not it would be willing to come in as a party plaintiff. I am of the belief, and this is putting the cart before the horse to some extent, that because of CBS having been or being the predecessor in interest of the plaintiff, holding in its hands the negatives, which are absolutely essential to the continuation of the business of the plaintiff, because CBS has a moral obligation as a contracting party to support the plaintiff, and because it has a moral obligation to its stockholders to the spinoff -- for all these reasons, I think that properly CBS should be aligned on the side of the plaintiff.

However, since CBS is not a party, there is nothing I can do except to either dismiss the action or adjourn it so as to enable the plaintiff to serve CBS, which I think quite foolishly has refused to become a party to the action.

The reasons why I think CBS is an indispensable party are essentially matters for my discussion since adding CBS as a party defendant would deprive this Court of jurisdiction.

I believe, in the first place, that the judgment rendered would be ineffective unless CBS were required to

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1 respond to it and that for the simple reason that this whole
2 impasse arises not from controversy so much between Viacom
3 and Tandem with respect to soliciting trade, but with respect
4 to Viacom being in a difficult position because it just can't
5 get product from CBS, and I think it is futile for this Court
6 to assume a discretionary jurisdiction, even if it exists,
7 to make a judgment or render a judgment which would not be
8 effective with respect to the main problem.

9
10 I must also take into account, although CBS apparent-
11 ly does not, that part of the defense of Tandem in this case,
12 judging from its memorandum of law, is that regardless of
13 the sanction of the Federal Communications Commission, the
14 original obtaining of distribution and foreign distribution
15 rights, as well as domestic syndication, was obtained illegally
16 by CBS because of its market position as a strong network and
17 because it was able to make this syndication right a tie-in
18 with simple network license.

19 I am not of course passing on the facts or validity
20 of these defenses, or anything else, except to indicate that
21 in my judgment since Viacom has many stockholders and CBS
22 has many stockholders and that the entire life of Viacom
23 may depend on such a determination, which could affect all
24 its rights as well as those in All In The Family, it is for
25 all those reasons that I believe it would be futile, wasteful

and dangerous to proceed with this case without the presence of CBS.

I therefore come to two alternatives. One is to adjourn the case to serve CBS today and make it a nominal plaintiff, and I am prepared to sign an order that it is realigned as a party plaintiff and to proceed with this case, or to recognize the following: one, that even though there may be some pre-selling of domestic syndication rights, as a practical matter there is no tremendous urgency about selling those rights since the network broadcast is likely to continue through the next season, if not beyond.

With respect to foreign syndication rights, if there is no competition with respect to All In The Family by virtue of some kind of standstill agreement, either arrived at by the parties or imposed by the Court, no great harm will come to anybody.

I think it is quite common in clearance situations in foreign territories for controversies to arise and for broadcast licensees, broadcast exhibitors, and others, to recognize it is not always the fault of the distributor that he is unable to obtain the prints, provided that it is in good faith, that the difficulty is in good faith.

It seems to me that this case is one which requires a certain amount of exposition. How much parol evidence

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is admissible I cannot tell; whether any is admissible I cannot tell.

I therefore renew my suggestion that what ought to be done is to continue this standstill until September, at which time I would suggest the parties agree that a full trial be not only of the preliminary injunction but also of the permanent injunction, and careful consideration can then be given, discovery can proceed in the interim, and I really don't think that as a practical matter anybody will be the loser. Indeed, as far as the prestige of Viacom is concerned, I would say that they can say there is a hassle between themselves, CBS, and Tandemand that everybody has been restrained by the Court and that that is the reason why they may not be able to furnish prints and tapes.

That I can't enforce on the parties, I can merely suggest it. If you all want to go in the hall and discuss it, it is all right with me.

MR. GOULD: I don't have to, your Honor.

THE COURT: I will step inside for a minute.

MR. GOULD: What date would your Honor have in mind? I am asked that question.

THE COURT: That is a good question, obviously.

MR. GOULD: We have the Judicial Conference the 6th and 7th.

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Hearing, July 23, 1973

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THE COURT: I would think around the 17th of
September, that week.

Exbr 1

MR. PEARSALL: Your Honor, just so I can talk to Mr. Gould about this thing meaningfully, may I inquire you would entertain the following amendment to the proposal you have made to counsel with respect to this standstill, and that is, that the parties stand still, with one exception, that the two contracts which are hanging fire and as to which the broadcasting companies are demanding the tapes, that those contracts, at least, be fulfilled?

MR. GOULD: I won't consent to that.

THE COURT: You mean you want the tapes delivered to Holland?

MR. PEARSALL: Yes, and to Finland, because we feel that we will in fact, if we are forced to, renege on those two contracts --

THE COURT: Tandem loses too.

MR. PEARSALL: Everybody loses.

THE COURT: That is why, Mr. Gould, I don't understand why you don't agree to that.

MR. GOULD: My clients won't agree to it, your Honor. We are not losing anything because we are not getting anything.

THE COURT: Why aren't you getting anything?

MR. GOULD: If your Honor would look at the numbers, you would see what is involved here is kind of a

joke.

MR. PEARSALL: Our client most certainly does not consider it funny at all, your Honor.

THE COURT: How much do they get out of these Holland things?

MR. GOULD: It is not broken down for Holland.

THE COURT: How much does Tandem get --

MR. GOULD: We get nothing out of this, your Honor.

THE COURT: All they take is a distribution fee.

MR. GOULD: That is a question, your Honor. This whole atmosphere is that they have something precious and if we interfere --

THE COURT: Let's not argue here.

MR. GOULD: The whole amount in all of Europe, other than England, is \$4400.

MR. PEARSALL: I understand they won't do it, and after our discussion, your Honor, I will ask the Court to make that one exception from a standstill order which would be a temporary restraining order. What I would request, your Honor --

THE COURT: I have no authority to do that

without a hearing.

MR. PEARSALL: You can issue a temporary restraining order.

THE COURT: I can, but I won't, without a hearing. Your problem arose from your failing to serve CBS, otherwise we would have gone on today. If you want to take the other alternative, I have another injunction on tomorrow, which I hope will take only a day or so -- serve CBS and we can start on Wednesday.

MR. GLEASON: Your Honor, with respect to the narrow question raised, CBS is certainly willing to deliver the tapes in question if the Court determines that it ought to.

THE COURT: I can't. How can I determine something without evidence?

MR. GLEASON: I think the suggestion was that there be a temporary restraining order --

THE COURT: I said I think CBS is foolish; they have to come in.

MR. GLEASON: I did hear that, your Honor, and I would be happy to respond to them.

THE COURT: Don't respond, just report it.

MR. PEARSALL: We will attempt to see what we can agree to.

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THE COURT: Serve CBS this afternoon and all be back here Wednesday, ready to go.

MR. PEARSALL: Fine.

THE COURT: What about the man from England, is there anything you need him for?

MR. PEARSALL: He was going to give a fuller exposition about his irreparable injury and he feels very strongly on the credibility issue. He will have to go back and we will do without him except to the extent we have had him.

MR. GOULD: I didn't have any cross examination of him. We can't have it one way.

THE COURT: Let's stipulate that when, as and if CBS is in the case, and I don't know how much according to Hoyle this is, this testimony will be introduced, the way you would have a deposition. Come back on the stand, Mr. Karshan. Except for that, it is adjourned until Wednesday morning.

MR. GOULD: I don't understand why this special treatment --

THE COURT: He has to go back to England.

MR. GOULD: All these people sitting here have to go to California and come back, your Honor. It doesn't take any longer to get from England than it does

from California.

THE COURT: True.

MR. GOULD: If we are going to try this,
let's try it.

THE COURT: I am taking into account his
physical condition as well.

H O W A R D K A R S H A N, resumed.

CROSS EXAMINATION

BY MR. GOULD:

Q Mr. Karshan, I understand you are the person
who is presently in charge of the selling of television
syndication for Viacom in England and on the continent of
Europe and the rest of the world?

A That is correct.

Q There is nobody else in Viacom that has more
to do with that subject than you?

MR. PEARSALL: Objection, your Honor.
I don't believe the witness heard the "rest of the world".

THE COURT: It is repetitious. There is no
jury here.

Q You are familiar, are you not, with the extent
to which the syndication rights in All in the Family were
sold by Viacom during the year 1972?

A I am not quite sure I understand your question.

THE COURT: He is asking you whether you know what went on.

THE WITNESS: In my area, yes.

Q Your area is England, Europe, Australia --

A No, it is not.

Q Just England and Europe?

A That is correct.

Q Then you are familiar with those two, area 1 and area 2?

A That is correct.

Q How much total --

A I gave to you already.

Q Well, indulge me. Through December 30, 1972, how much business did you do on All in the Family in England and Europe, gross?

A The only figures I can give you right now is the total gross I have done since we have started to distribute the series.

THE COURT: How much is that?

THE WITNESS: Which I gave before, which I think is \$140,000.

THE COURT: Of that \$140,000 during that same period, how much did you remit to CBS for Tandem?

THE WITNESS: The structure of the company

1 is that we do not remit directly, we remit to our New York
2 office. So I can't answer that question.

3
4 THE COURT: Is there anybody here from the
5 New York office of Viacom?

6 MR. PEARSALL: Mr. Block is, but he is not
7 an accountant, your Honor, and I am not sure the information
8 he has --

9 Q Have you ever seen this piece of paper, called
10 All in the Family, statement of gross receipts and cost
11 for the period ended December 30, 1972?

12 A No.

13 Q Never saw it before?

14 A No.

15 Q Do you supply figures from London to the
16 Viacom office in New York?

17 A These I do (indicating).

18 Q You would recognize the figures in column 2,
19 wouldn't you?

20 A Let me explain --

21 Q Just answer yes or no.

22 THE COURT: Let him explain it.

23 A We do our bookkeeping on the basis of billing.
24 For example, if we sell a series now and we do a booking
25 now, for example, and the client who we sell to is

not to pay us until next year, that would not appear in the figures.

Q All I am --

A Do you understand what I said?

Q Yes.

THE COURT: You are on a cash basis?

THE WITNESS: Not a cash basis, it is when we bill.

THE COURT: You don't put it on the books?

THE WITNESS: It appears just in the booking receipt.

Q The period of the greatest success for All In The Family was 1972, wasn't it?

A I think All In The Family is very well accepted right now.

Q But in 1972 it was very well accepted?

MR. PEARSON: I object to that, your Honor.

THE COURT: I will allow it.

Q It was a hot property in 1972?

A Yes, and it is a hot property in 1973.

Q Let's stay with 1972 for a minute. You know that all you did in England in 1972 was \$79,000 gross receipts?

A It is very difficult for me without my records

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Karshan-cross

to break down what we have done between 1971 and 1972.

Q Didn't you bring your records?

A No, I didn't. They are all in the United Kingdom. It is lucky I brought myself, with this thing on my foot (indicating).

Q I am sure of that.

You knew what you were coming for?

A Absolutely, on short notice, I must say.

Q All the information that New York gets from England comes from your office in London?

A That is correct.

Q And if I represent to you now that this comes from this piece of paper I am showing you -- this piece of paper comes from the Viacom office in New York, just look at \$79,000 figure -- does that sound right to you?

MR. PIERSALL: I object to the cross examination of this witness on a piece of paper he has not seen before, did not prepare, and which is not in evidence.

THE COURT: Sustained.

You can get it from the New York office.

MR. GOULD: That is what is in my hand, your Honor.

THE COURT: Well, put it in evidence.

MR. GOULD: I offered it before and I offer it

2 again.

3 (Defendant's Exhibit A was marked for
4 identification.)

5 THE WITNESS: Your Honor, I am not familiar
6 with this, but can I comment as we go along?

7 THE COURT: No.

8 MR. PEARSALL: I object to this going into evi-
9 dence. It has not been properly identified. This witness
10 cannot identify it.

11 THE COURT: Sustained.

12 Q I just want your best recollection as to what
13 the gross receipts were for All In The Family in England and
14 the Continent, your areas, in 1972.

15 A I can't give you that.

16 THE COURT: I will sustain the objection on the
17 ground that it is not the best evidence. He has given you
18 what he can.

19 MR. GOULD: He has not, your Honor, because he
20 has records and he just didn't bring them.

21 THE COURT: But the records are there, so what
22 do you want? Get it from the New York people.

23 MR. GOULD: When I get them from the New York
24 people, I am met with the fact that I am anticipating
25 another witness and have not laid the proper foundation for

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1 it. They asked for the privilege of putting the man on
2 the stand out of order and then when I have to use the
3 only document available from the New York office, I am
4 met with a snivelling, technical objection because he has
5 not seen it and I have not laid a foundation.

6 I will object to his being called out of order
7 and move to strike out his testimony on the ground that it
8 is not possible to cross examine him on the basis of
9 these objections.
10

11 THE COURT: Motion denied.

12 MR. GOULD: No further questions, your Honor.

13 THE COURT: You may step down.

14 (Witness excused.)

15 THE COURT: I want to tell you that unless
16 Mr. Gould stipulates, this witness won't be considered,
17 because I said it would be treated as a deposition and you
18 may have to bring him back.

19 MR. PIERSALL: We can't bring him back Wednesday,
20 your Honor.

21 THE COURT: Not Wednesday, but some other time.
22 I don't think he has testified to anything substantial.

23 MR. PIERSALL: Your Honor, on direct
24 examination this witness would have testified I think
25 fairly completely concerning ---

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2 MR. GOULD: I object to an offer of proof,
3 your Honor. I don't care what he would have testified
4 to and I don't think your Honor can take it on that basis.
5 I am irritated because of the objection to the piece of
6 paper, your Honor. This piece of paper comes from their
7 office, he knows what it is, the witness can be refreshed
8 immediately as to what it is, and there is no reason for
9 technical objections of this kind in view of the fact that
10 they asked the Court's indulgence to call the man out of
11 turn.

12 I don't think it is gracious, proper, and I am
13 not interested in what the witness would have testified
14 to in these circumstances and I don't think the Court
15 should be.

16 MR. PEARSALL: This hearing was called on
17 a preliminary injunction motion. One of the principal
18 issues on that motion is the question of irreparable
19 injury, not monetary damages, but irreparable injury.
20 This witness is peculiarly situated, your Honor, to explain
21 to the Court exactly the respects in which things such as
22 prestige, credibility, reputation, good will, investment
23 in the building of a market and all of these things will
24 be affected if we do not have a preliminary injunction.
25 This witness is not here as a bookkeeper to explain

monetary questions having to do with damages. That is not the issue on this motion.

As far as having to bring him back is concerned, I see no reason why the testimony he has given today, when he had a perfect opportunity to be cross-examined -- Mr. Gould knew --

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THE COURT: I have no jurisdiction today, that is why.

MR. PEARSALL: Mr. Gould knew this hearing was going to be held this morning and had ample opportunity to prepare cross-examination.

THE COURT: I do not appreciate the attitude of either counsel in this case. I find it most offensive and I must say that. I think there should be more of a spirit of cooperation. I think it is perfectly ridiculous you don't stipulate these things. I think Mr. Gould is wrong in not stipulating that this witness's testimony can come forward, and I think you are wrong in urging objections to documents you know come from the New York office and I don't like to try a case in that matter.

MR. PEARSALL: The basis of my objection is that this witness is being confronted with something he knows nothing about.

THE COURT: I sustained it because I had to, but I don't think it is desirable.

I am saying this witness's testimony is no part of the record, that it may be deemed a deposition which may be admissible on stipulation or, I suppose, may be admissible on the part of Tandem as an admission, if there is any admission it wishes to use, but I am hopeful there will

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be a stipulation and that it ought to be arrived at very promptly so that this gentleman will know whether or not he has to come back.

MR. GOULD: If your Honor please, I have indicated to the Court that I am prepared to continue the existing stipulation and order, which is the standstill agreement in its existing form, pending a trial of the case on September 17 or such other date as your Honor feels --

THE COURT: I think it would be gracious, and maybe this should be off the record --

(Discussion off the record.)

MR. GOULD: I am prepared to recommend to my client, your Honor, that we consent to an extension of the stipulation and order, the copy of which is undated, by the way -- I was not in the case at the time --

MR. PEARSALL: It was so ordered July 9, 1973.

MR. GOULD: The stipulation and order dated July 9, 1973, I undertake to recommend to the client that we extend all of the provisions of that order at least until the trial date fixed by your Honor and then of course subject to the further order of the Court or further stipulation of the parties. I am prepared to recommend to the client that on delivery to us of Xerox or reproduced copies of existing agreements for the sale of All In The Family in Holland

1 and Finland -- I think those are the two countries about
2 which they were concerned -- that with respect to those,
3 pending the further order of the Court in the circumstances,
4 we will authorize CBS to deliver to Viacom the tapes
5 necessary for the performance of the obligations of
6 Viacom with respect to its contracts for distribution in
7 those two countries -- existing contracts, not new
8 obligations.

9 THE COURT: Is that agreeable?

10 MR. PEARSALL: Perfectly agreeable.

11 THE COURT: To make that clearer, it is under-
12 stood that neither party will offer or sell All In The Family
13 any place in the world, including the United States, just as
14 broad as that.

15 MR. GOULD: I think that is in here, your Honor.

16 THE COURT: It is all included.

17 MR. GLEASON: Your Honor, may I inquire of Mr.
18 Gould whether or not when he said tapes he included whatever
19 else was normally distributed by CBS?

20 MR. GOULD: Sure, tapes or reels or whatever they
21 need.

22 MR. PEARSALL: It is pointed out to me something
23 which I misunderstood to be a commitment was a commitment to
24 recommend to his clients
25

1
2 MR. GOULD: I am going to talk to him, if I am
3 given a chance to talk to him.

4 THE COURT: This is a recommendation by Mr. Gould
5 which he stated on the record, which, however, he must get
6 the answer to by, let's say, tomorrow noon, at the latest,
7 because we have to then determine whether we go forward on
8 Wednesday morning, and I expect counsel to be here on Wed-
9 nesday.

10 MR. GOULD: There may be somebody in the room
11 who can give me the answer right now, but I have to have a
12 chance to ask him about it.

13 THE COURT: If you do it now, it is better.

14 MR. GOULD: It will just take me a minute.

15 (Pause.)

16 THE COURT: Mr. Gleason, I think in the meantime
17 you should find out whether you have permission to accept
18 service for CBS, or do you want them to be served uptown?

19 MR. GLEASON As between the service of our firm and
20 service of CBS uptown, I don't think we would want to draw a
21 distinction.

22 THE COURT: It is much easier for them to give you
23 a summons and complaint, but I don't want to force you.
24 If you do not have authority, don't do it.

25 MR. GLEASON: I would prefer not to deal with the

present case except as previously stated.

MR. PEARSALL: I am sure I can find out where to effect service, your Honor.

With respect to the service of the complaint, your Honor, may I present to your Honor shortly after this proceeding an order designating a special process server so that we don't have to have the marshal serve them?

THE COURT: Yes. I am hoping even more that Cravath would accept service, and then he wouldn't even need that.

MR. GOULD: All right, provided we get the contracts, if they show under the contracts -- and there is one other thing --

THE COURT: They can't get you the contracts unless they are here.

MR. GOULD: They can get it from Switzerland, your Honor.

THE COURT: You won't get it by Wednesday morning then.

MR. PEARSALL: If we can have an agreement right now which is subject to the one condition only that I provide the contracts, I am agreeable to making that.

THE COURT: I am sure it is in good faith on both sides and I am willing to do it that way. I will set it

2 down for September 17 and I will try to have the clerk let
3 you know if it is coming along or not, because I have a
4 case that week that may break.

5 MR. GOULD: Mr. Shelton asks the question whether
6 they are going to serve CBS.

7 MR. PEARSALL: We will serve them today.

8 MR. SHELTON: I take it your Honor will be
9 presented with an order, with an alias summons, or an
10 additional summons joining CBS as a party?

11 THE COURT: A supplemental summons. I have indicated
12 already that unless somebody convinces me to the contrary,
13 I am going to realign CBS as a plaintiff.

14 MR. SHELTON: Your Honor has not ruled on that
15 definitely yet.

16 THE COURT: No. You could persuade me. It will
17 take a little persuasion, but it is possible.

18 I am going away on the 31st of July and if CBS has
19 any application, you better make it pronto.

20 MR. GLEASON: We will keep that in mind.

21 THE COURT: I think it is to your advantage to be
22 in it.

23 Anything further? This case is adjourned, subject
24 to the stipulation, until the 17th of September.

25 MR. PEARSALL: Thank you, your Honor.

MR. GOULD: Thank you, your Honor.

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TRANSCRIPT OF HEARING, JULY 30, 1973
(Transcript, pages 1-34)

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

Hearing, July 30, 1973

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3 ----- X
4 VIACOM INTERNATIONAL, INC., et al., :

5 Plaintiffs, :

6 v. :

: 73 Civ. 2941

7 TANDEM PRODUCTIONS, INC., :

8 Defendant. :

9 ----- X
10 July 30, 1973,
11 10:35 A.M.

12 Before:

13 Hon. Murray I. Gurfein,
14 District Judge.

15 APPEARANCES:

16 HUGHES, HUBBARD & REED, ESQS.,

Attorneys for Plaintiffs,

17 By: Otis Pratt Pearsall, Esq., and
James F. Parver, Esq., of Counsel.

18 SHEA, GOULD CLUMENKO & FRAMER, ESQS.,

Attorneys for Defendant,

19 By: Martin I. Shelton, Esq., of Counsel.

20 Present: Robert S. Rifkind, Esq., and
James F. Gleason, Jr., Esq.
21
22
23
24
25

THE CLERK: Viacom v. Tandem Productions, Inc.

THE COURT: Is everybody here? Is anybody missing?

MR. PEARSALL: I think everybody is here, your Honor.

THE COURT: Is Mr. Gould coming?

MR. SHELTON: No, your Honor, Mr. Gould is not in town.

MR. RIFKIND: Your Honor, I requested a brief audience and I hope it has not turned into more of a production than was planned, because while I am uncertain that I am properly here at the moment, for the reasons spelled out in Mr. Gould's letter to the Court, it is not at all clear we have been served in this case, but it did seem to me in light of the press of time, the early trial date set, I should not sit back and wait for the formalities to be resolved and ought to call to the Court's attention the very serious problem we have with the proposed order submitted by Viacom, which was on your calendar on Friday.

That order recites that we, CBS, should be realigned as a party plaintiff in this action because CBS' interests are identical to those of Viacom.

THE COURT: Well, I wouldn't sign an order like that.

MR. RIFKIND: The point I would like to convey and

1 that I would like to suggest as a solution to the complicated
2 problems that have arisen, is that CBS has no interest
3 whatever in this litigation.
4

5 THE COURT: That is what you say.

6 MR. RIFKIND: I say that, indeed, and I can explain
7 that, I think, in one minute.

8 CBS, in response to the rules promulgated by the
9 Federal Communications Commission some time ago, undertook
10 to get out of the syndication business altogether, as we
11 were required to do. In preparation for the effective date
12 of that set of rules, we conveyed to Viacom, then a wholly
13 owned corporation, a quit-claim deed, without warranties,
14 without guarantees, without covenants.

15 THE COURT: How can you quit-claim a part of a
16 copyright?

17 MR. RIFKIND: We quit-claimed the syndication
18 rights.

19 THE COURT: But how can you do that? You retained
20 the network rights and therefore you retained a license and
21 you gave a sublicense, but not a sublicense of the whole,
22 a sublicense of part.

23 MR. RIFKIND: Your Honor, all we said to them is,
24 whatever syndication rights we have ---

25 THE COURT: We have?

1
2 MR. RIFKIND: Whatever syndication rights we have,
3 and we do not assure them we have any, but whatever we have
4 in a whole library of programs, specified and unspecified,
5 "They are yours," and then we spin Viacom off.

6 THE COURT: Retaining, however, a part of the
7 license you had from Tandem.

8 MR. RIFKIND: We retained the network rights,
9 that is correct.

10 It seems to me, your Honor, that since, while
11 we wish Viacom, if Viacom is very successful in the syn-
12 dication of All In The Family, it makes no difference to
13 us, and if All In The Family is never syndicated, it makes
14 no difference to us.

15 THE COURT: Don't you feel a moral obligation
16 to support your grant?

17 MR. RIFKIND: I must say, moral obligations --

18 THE COURT: We will come to the equitable later.

19 MR. RIFKIND: I think in the peculiar circum-
20 stances of this particular transaction, your Honor, we do
21 not feel any overriding obligations to do anything. We
22 introduced Viacom to Tandem and said, "You work it out.
23 We are not in this business any more."

24 THE COURT: Well, you did that much later. Are
25 you familiar with the Independent Wireless v. RCA case, 269

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2 U.S.?

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3 MR. RIFKIND: I am afraid not.

4 THE COURT: I would recommend that the Cravath firm
5 read that case, in their representation of CBS. I could read
6 it entirely wrong, but I think I read it right. What Chief
7 Justice Taft said there was that where a copyright is in-
8 volved -- in that case it was a patent, but I think it is
9 the same thing -- where you have divisible rights, some of
10 which are retained and others of which are granted to an
11 exclusive licensee, there can't be any federal jurisdiction,
12 obviously, based on the patent grant or the copyright grant
13 because the suit, on hypothesis, is under contract. Neverthe-
14 less, it is the duty of the grantor to vindicate and support
15 the title of his grantee, the exclusive licensee, who got
16 less than the whole but got part of what he derived from
17 the grantor, it being therefore the grantor's duty to permit
18 him to sue in the name of the grantor, for example, and he
19 may be made an involuntary plaintiff because equity recognizes
20 that he has an obligation to defend the title of the grantee.
21 That is what I think is relevant to this case and I would
22 like to hear you on that subject.

23 MR. RIFKIND: Well, your Honor, I am obliged to
24 you for pointing that out to me. I still think that as a
25 practical matter we have very little to contribute to the

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2 case. There are cases, no doubt, where we will have to
3 litigate some of the questions that may arise in this but
4 my client feels quite strongly that in a case in which
5 there is nothing we can win, no matter what the outcome,
6 they are very reluctant to engage in the costs and expenses
7 of litigation.

8 THE COURT: That is exactly the point, nobody
9 says you have to do anything, you just have to be here.
10 Of course, as the Supreme Court has said, even if you don't
11 come, you will be bound, having been given notice of the suit.
12 This is going to be res judicata against you no matter what
13 you do and you lose nothing by coming in.

14 MR. RIPKIND: Perhaps I could suggest an alternative
15 solution, your Honor. It seems to me CBS does have certain
16 properties in its possession that are necessary to carry on
17 the business of syndication. Those are the properties which
18 Tandem instructed us no longer to deliver to Viacom and
19 which we had been holding for the resolution of this question.
20 It would seem to me, in those circumstances, that the
21 solution to our problem lies along the line of interpleader
22 and what I would propose, with your Honor's consent, is to
23 be bound by, to submit an order binding CBS to hold all those
24 properties necessary for the syndication of All In The
25 Family subject to the further order of the court and directing

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Viacom and Tandem to interplead their claims with respect to those properties.

THE COURT: Well, is that fair to Viacom? You gave them a grant and why are you suddenly a stakeholder? You are an assignor.

The reason I raise this thing is that other federal judges have commented on this -- there is a case I think Judge Kennedy had in Brooklyn -- where because of the commercial relationship that is going on between, let's say, CBS and Tandem. the court should be very circumspect about permitting an abdication of the function of CBS and protecting its licensee. Just because you find it more to your commercial advantage to be neutral doesn't allow you necessarily to be that.

MR. RIFKIND: I take it Viacom has not expressed great concern as to whether we are present or not. They were at the outset quite content that they proceed without us.

THE COURT: And the defendant quite properly raised the question of a necessary party.

MR. RIFKIND: It doesn't appear, your Honor, that Viacom's very able counsel have thought that we were abdicating on any responsibilities we had to Viacom.

THE COURT: They were obviously afraid that they would lose federal jurisdiction.

1 MR. RIFKIND: But there is state jurisdiction
2
3 too.

4 THE COURT: It doesn't mean anything in the
5 business sense, it means they may have misread the statute,
6 or maybe I did, but they think CBS is a necessary party.
7 If you want to do it by interpleader, I don't know why any-
8 one would object to that, except me. I think now they
9 have served you, you have notice, it is going to be res
10 judicata against CBS, if my guess is right, and I think the
11 matter ought to proceed.

12 It seems to me it is a lot of dancing around here:
13 Do you want federal jurisdiction or do you not? I believe
14 there is federal jurisdiction here properly without collusion
15 by realignment of the parties. If somebody thinks it will
16 make it more difficult for Viacom -- is CBS amenable to
17 suit in California? I suppose they are.

18 MR. RIFKIND: Undoubtedly.

19 THE COURT: I suppose somebody wants Hughes,
20 Hubbard & Reed to hire California counsel and go to the
21 California state court.

22 MR. RIFKIND: They have a resident partner in
23 California.

24 THE COURT: Is Tandem suable in New York?

25 MR. SHELTON: I think there is a question about

1 it, your Honor. They are not authorized to do business
2 here nor have we any office here.

3
4 THE COURT: I would doubt there is a clear case
5 of New York State jurisdiction.

6 MR. PEARSALL: Your Honor, we rely upon the long-
7 arm statute, since this deal was negotiated in New York and
8 under the authorities I think it is quite clear jurisdiction
9 is in New York.

10 THE COURT: I suppose you can argue that.

11 MR. RIFKIND: I must say, your Honor, that if
12 Tandem is serious in raising a wide variety of rather com-
13 plicated antitrust issues, which would be binding in their
14 resolution on CBS, I don't think I can be prepared to try
15 those issues a month from now or a month and a half from now.

16 THE COURT: You may not be able to try the issues,
17 but you may very well be able to make a motion based on
18 Bruce's Juices and other cases like that -- I am not passing
19 on this in advance, but it seems obvious there is a legal
20 question here as to whether Tandem can raise the antitrust
21 defenses after accepting the benefits of the network contract.

22 MR. RIFKIND: If those issues are not to be liti-
23 gated, and that would seem to me the more likely outcome,
24 all the more reason why having CBS aboard really doesn't
25 contribute anything to the resolution of the action.

1
2 I would like to submit the proposition, and
3 I can hand up a proposed order, which will accomplish
4 just what I say --

5 THE COURT: Well, what is your order? Let me
6 see it.

7 (Document handed to the Court.)

8 THE COURT: Your interpleader does not strike
9 out the defense Tandem has chosen to assert, with respect
10 to the invalidity of the transfer from Tandem to CBS of
11 syndication rights. Their claim is, in short, that even
12 before the Federal Communications Commission acted that
13 as a matter of antitrust law, under the Sherman Act, there
14 was a defect in the sense that the contract represented
15 a tie-in by a monopolist.

16 Therefore, it isn't merely giving the prints and
17 for me to decide in the abstract that it is a question
18 of antitrust law which casts doubt on the very title of
19 CBS in the first place, without its presence, seems to me
20 unwise.

21 MR. RIFKIND: I do not understand that Tandem
22 is now suggesting that the network rights, which we did
23 obtain --

24 THE COURT: Then you are in a position where
25 you fool your stockholders when you have the spinoff by

1
2 pretending to give them rights which you had illegally
3 obtained without revealing it and you might even get in
4 trouble on your proxy statement.

5 MR. RIFKIND: All we conveyed was whatever
6 we had lawfully obtained. If the Tandem-CBS agreement
7 is void, then I don't know the rights.

b3 8 THE COURT: When you said everything, you also
9 said including the 1971-1972 network broadcast season,
10 and specifically mentioned All In The Family.

11 MR. RIFKIND: The wording of that agreement is,
12 "That we conveyed CBS' rights with respect to the programs--
13 "CBS assigns, transfers and conveys to Viacom hereunder
14 a quit-claim of whatever rights to exercise syndication
15 rights CBS may have in the programs, and CBS hereunder
16 makes no warranty, express or implied representation, or
17 covenant of any nature whatsoever with respect to any right
18 to exercise syndication rights which CBS may have in the
19 programs."

20 THE COURT: But you are dealing with yourself
21 at that point. When you created the spinoff --

22 MR. RIFKIND: These agreements were meticulously
23 and elaborately reviewed by the SEC for compliance with
24 their orders and by the Ninth Circuit in ancillary liti-
25 gation.

1 THE COURT: I am trying to say the purpose of
2 it was quite different, it was to indicate that there was
3 no residual right remaining in CBS and that therefore the
4 spinoff was in strict accordance with the rule of the FCC.
5 That is what the whole thing was all about and that is why
6 there was a divestment order by the principal stockholders.
7

8 MR. RIFKIND: It was, in addition, to make it
9 perfectly clear that we were not entering into any guarantees
10 as to the nature and substance of those rights because we
11 didn't want to find ourselves in precisely this situation.
12

13 THE COURT: I thought I had disposed of this
14 matter last week, at least for the month of August, and
15 now I find it rearing its ugly head again and I don't
16 understand what is so urgent about determining whether or
17 not CBS is a party. I take it there has only been a
18 summons so far, there has to be an amended complaint, and
19 then it becomes sub judice, if you want to make a motion.
20

21 MR. RIFKIND: I was under the impression that
22 he was hastening towards trial in early September.
23

24 THE COURT: I said the 17th of September, and
25 it is a temporary injunction and I don't think six weeks
is a very short time for the preparation of a temporary
injunction.

MR. RIFKIND: I appose the difficulty between

me and my friends at Viacom is that I am in no rush about this but they are in a hurry. If it can await further consideration on motion properly made, I am content with that.

THE COURT: It is a very difficult question, not an easy one, and as I say, you have conflicting arguments here.

I am persuaded by the fact that despite your disclaimer of warranty, although I must say the other cases I know have never considered that subject, that you are talking of a licensing by sublicense of a license granted by the copyright owner, which is a typical case, it seems to me, of an impleading on a realignment of the grantor, the transferor of the sublicense.

I rely on the fact that there is an equitable duty, and in New York law there is actually a duty morally to support a grant, and you know that. You must do everything possible to maximize the benefit that is received by the licensee or the transferee.

MR. RIFKIND: My friends at Viacom have never called on us to join.

THE COURT: I don't think they did it right, with all due respect.

MR. RIFKIND: My friends at Tandem have never

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suggested that any other aspect of the agreement between Tandem and CBS was infected or tainted. That is, they have never suggested we do not have an agreement for the network broadcast.

THE COURT: That is where Bruce's Juices comes in. On the one hand, you can't say, "I am going to get the benefit of having an exploitation on a television network and, at the same time, I am going to claim antitrust violations by tie-in of domestic syndication."

Again I repeat, I am not passing on it in advance, because I don't know all the law, but it strikes me that is a very difficult field of antitrust law, to overcome taking benefits and still arguing that it is illegal.

MR. RIFKIND: I couldn't agree with you more, your Honor.

THE COURT: You may prevail on that. I made a remark the other day which I shouldn't have, and I withdraw it, that CBS' counsel were foolish in not being in the case, and I withdraw that, because that is counsel's problem and not mine.

If you feel confident of the Bruce's Juices and that you can defeat the claim of Tandem in this case, you may be very wise to have that settled once and for all so that it doesn't hang over your head.

In addition to that, I call your attention to this: that you had a schedule of programs which were purported to be licensed, or sublicensed, to Viacom in addition to All In The Family and there may be others, independent producers, in the shoes of Tandem or in the capacity of Tandem who may raise the same antitrust problem, in which event Viacom will have nothing.

You say, "I couldn't care less because we lost no money," but I don't think that is the right attitude.

MR. RIFKIND: But, your Honor, nothing in the decision of this case with respect to All In The Family would bind or determine the rights of independent producer A, B or C.

THE COURT: If I should decide and the Court of Appeals upholds me that Bruce's Juices applies in a case where you take the benefit of a network presentation and try to knock out the domestic distribution and foreign distribution, then you are home free.

MR. RIFKIND: As a matter of stare decisis?

THE COURT: Yes, or not even stare decisis -- well, call it stare decisis.

MR. RIFKIND: Persuasion?

THE COURT: Well, call it that.

MR. RIFKIND: In the three years since Viacom

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2 and CBS parted company, no one has raised this question and
3 I suspect it will only arise in the unique situation of
4 All In The Family, where at the time it was obtained no one
5 thought it was worth very much, frankly, but it has since
6 proved to be worth a great deal.

7 I think the fact that there have not been any other
8 such cases is indicative of the fact that we are probably
9 not going to have any.

10 THE COURT: I take back what I said about what
11 you should do. You do whatever you want to. You are big
12 boys. I still say that I believe at the moment that CBS
13 should be in the case. I believe CBS should be a plaintiff
14 and not a defendant and I believe there is federal juris-
15 diction, subject to checking again, if you want to make a
16 formal motion.

17 MR. RIFKIND: I would like to do that and I take
18 it if we do that by the time your Honor returns --

19 THE COURT: I will be back right after Labor Day
20 and you can do it then.

21 In the meantime, I thought we had agreed that
22 we were going to have a stipulation, Mr. Shelton, and that
23 everything will be in status quo and you will see to Finland
24 and Holland, or something.

25 MR. BEARSALL: We have not been able to get the

1 stipulation agreed to here on the transcript reduced to
2 a signature. We discussed it this morning and hopefully
3 we will be able to do it this morning.
4

5 THE COURT: You better do it today, because I am not
6 going to stay over for you on Wednesday.

7 MR. PEARSALL: We submitted it to them on Thursday,
8 your Honor.

9 THE COURT: There is always a motion judge in
10 Part 1, but he will have to study it all over again.

11 MR. PEARSALL: We want this completed today, your
12 Honor.

13 MR. SHELTON: I don't anticipate too much diffi-
14 culty. There is one sticky problem I may not be able to
15 work out and if I can't, I would like to come to your Honor.
16

17 MR. PEARSALL: There is one particular point we
18 might as well get on the table: the stipulation provided
19 very clearly, and on the record, that subject only to our
20 producing these contracts, which I understand are on their
21 way from Switzerland, Tandem would instruct CBS to release
22 to us the tapes, reels, whatever it is, which is necessary
23 for us to comply with our existing obligations under these
24 two contracts. Tandem this morning has said it wants to
25 imply a further limitation upon that agreement and it wants
to limit us to receiving from CBS only those materials which

1 we need between now and September 17th, which was the date
2 your Honor set.

3
4 As Mr. Karshan pointed out, that is totally im-
5 practical, it has to be delivered in bulk --

6 THE COURT: I understood they had to deliver
7 all at one time.

8 MR. SHELTON: I do know, your Honor, that
9 the stipulation appears on the record and said with respect
10 to those, pending the further order of the court in the
11 circumstances, "We will authorize CBS to deliver to Viacom
12 the tapes necessary for the performance of the obligations
13 of Viacom with respect to those two contracts in those
14 two countries."

15 I did think if they had a contract for two years
16 we were not going to deliver them all at once. That was my
17 impression, your Honor.

18 THE COURT: There was a representation made,
19 as I recall it, because I had made the same suggestion, you
20 remember, that under the contract they are required to
21 deliver all the prints for all episodes at one time and
22 that was agreed to.

23 MR. PEARSALL: What Mr. Karshan said was that
24 it is not practicable to deliver to or for of this kind
25 of thing, that there were 20 episodes -- it was his

1 recollection that there were 20 episodes involved and that
2 it was necessary to deliver them. I don't think he said
3 it was stated in the contract and I have not seen the
4 contract, but he did state as a matter of practicality that
5 it was essential.
6

7 THE COURT: The reason he gave was a very simple
8 one, that they had a lead on time, because they either had
9 to put foreign subtitles on or dub it.
10

11 MR. PEARSALL: There is a changing of tape, your
12 Honor, because the line system is different here as against
13 there.
14

15 THE COURT: The zeal of advocacy seems to overcome
16 you and Mr. Gould, Mr. Shelton. You are good advocates,
17 but why don't you see the forest for the trees? What
18 difference does it make if they get all the tapes? You get
19 the benefit of it, if any, by the fact that you own the
20 copyright.
21

22 MR. PEARSALL: I had put in the specification
23 that in the event it is subsequently held that we have
24 no right to make the sales, we will account to Tandem for
25 any profits.
26

27 MR. SHELTON: All I want to do is, aside from
28 additional words which I think we will work out -- all I
29 want to put in is subject to the further order of the court.
30

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2 THE COURT: But you have to give them the right
3 to give them, if required by the contract or whatever
4 you want to put in there, all the tapes required.

5 MR. SHELTON: Are there more than 20 programs
6 involved here? I don't want to bind myself for two years,
7 your Honor.

8 MR. PEARSALL: I am prepared to accept the
9 limitation Mr. Karshan put on, of the 20 episodes, because
10 he made it clear that was his recollection.

11 MR. SHELTON: Very good.

12 THE COURT: CBS will sign that stipulation too?

13 MR. SHELTON: I don't think it is necessary.

14 THE COURT: How do you get the tapes?

15 MR. RIFKIND: We will be happy to deliver it to
16 whoever the parties stipulate.

b5 17 THE COURT: We are finished with that and I hope
18 you get that signed. The only other thing I had, which I also
19 thought was closed, was a reassessment of the order I signed
20 with respect to the confidentiality of documents, and I
21 don't know why I have to bother with that today, busy as I am.

22 MR. PEARSALL: May I take up what I think are much
23 more significant substantive matters, your Honor?

24 THE COURT: What is that?

25 MR. PEARSALL: The first thing I would like to

1 address myself to is the procedural tangle we have gotten
2 ourselves involved in here so far as this bringing in of
3 CBS is concerned. Right now, your Honor, the situation
4 I think is a bit of a jumble and I want to straighten it
5 out --
6

7 THE COURT: Well, that is up to the parties, not
8 up to the court.

9 MR. PEARSALL: I have submitted, your Honor,
10 three orders. My proposal is, your Honor, that you sign
11 an order which I delivered to your chambers on Friday --
12

13 THE COURT: I won't sign that order.

14 MR. PEARSALL: I think you may be confused as
15 to which order I am speaking of.

16 THE COURT: The one about identical in interest?

17 MR. PEARSALL: No, your Honor. We gave you
18 an order on Friday which merely provides, authorizes the
19 service of a second amendment complaint, a copy of which
20 is annexed thereto, reflecting the addition of CBS. Our
21 point is this, what we did last Monday following the court
22 hearing was to serve on CBS a new summons but the old
23 amended complaint. A question has been raised by the Shea,
24 Gould firm as to the propriety of that course of action.
25 To remedy any possible defect in the service of CBS, what
we propose to do is serve a second amended complaint which

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2 in paragraph 10A specifically says that we have asked CBS
3 to come in as a party and that they have refused.

4 THE COURT: That is in the complaint?

5 MR. PEARSALL: Paragraph 10A of the second amended
6 complaint, your Honor. What this order would do is nothing
7 more than permit us to serve that second amended complaint.
8 After that service is complete, which will be within an hour,
9 we will then submit to your Honor a revised realignment order
10 which will not say, "identical interests" but will say
11 appropriate language, which we will put in there, indicating
12 that they should be realigned.

13 THE COURT: Follow that Wireless case against RCA.

14 MR. PEARSALL: We will check that and use that
15 language.

16 THE COURT: There is Perkins in 29 FRD 16, and
17 there is Judge Goldberg's statements in Eikel v. State
18 Marine Lines, 473 Fed. 2d 959, at 962.

19 MR. PEARSALL: We will pick out the appropriate
20 language, which will not be "identical interests" but suitable
21 language for that purpose and present to your Honor this
22 afternoon a further separate order which will provide for
23 the realignment.

24 MR. SHELLTON: I am a little confused, your Honor.

25 THE COURT: So am I.

1 MR. SHELTON: I got a letter from Mr. Pearsall,
2
3 July 26th -- is that the order we are presently talking
4 about?

5 MR. PEARSALL: I am talking about one sent to you
6 on July 27th.

7 MR. SHELTON: We don't have it.

8 MR. PEARSALL: It was delivered to you and if
9 you don't have it, it is probably in your office.

10 MR. SHELTON: May I have a copy?

11 MR. PEARSALL: Yes.

12 MR. SHELTON: Did it come with a covering letter?

13 MR. PEARSALL: Yes.

14 THE COURT: I will read it out loud, "This letter
15 supplements our letter to you dated July 26, 1973. In the
16 event your Honor believes it is inappropriate to combine
17 in a single order permission for us to serve and file the
18 second amended complaint naming CBS as an additional party
19 with a determination CBS be realigned as party plaintiff,
20 we have submitted for your Honor's consideration an alter-
21 native form of order permitting us to serve and file the
22 attached second amended complaint, which adds a new paragraph
23 10A dealing with the addition of CBS as a party and in the
24 event your Honor signs the enclosed order, we will then ask
25 that your Honor sign an order previously submitted."

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2 MR. PEARSALL: I will give you another order, your
3 Honor.

4 THE COURT: Let me see 104. Why do you insist
5 on using that language, "identical interests"? You are
6 just confusing the issue.

7 MR. PEARSALL: Of course this is a pleading and
8 is not binding on anybody and we won't put that in the
9 order.

10 THE COURT: It is not binding on anybody, but
11 it still confuses things.

12 MR. RIFKIND: It confuses me.

13 THE COURT: The proper allegation is, "CBS
14 transferred to us by way of a sublicense of an exclusive
15 license, certain rights in the copyright and performance
16 of All In The Family as the licensor to the plaintiff,
17 any exclusive licensee, of part of the rights of CBS. CBS
18 is under obligation to support or defend the title of the
19 plaintiff. CBS has been requested to do so and has refused.
20 Accordingly, it is incumbent upon it to join as a plaintiff
21 and for its failure and refusal to do so, it is hereby
22 named a defendant."

23 That is what I think is the form of the amended
24 complaint.

25 MR. PEARSALL: Your Honor, obviously these rights

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2 somewhere in deep history are grounded in copyrights,
3 several contracts back, but our rights, on their face,
4 do not purport to be copyright rights.

5 THE COURT: Then you are in the public domain.
6 You can't have a common law copyright, obviously, because
7 it has been broadcast. You have to have a licensed copyright
8 based on the federal copyright statute. That doesn't mean
9 you get federal jurisdiction, because you are suing on
10 a contract, and you are basing it on diversity, but your
11 final rights stem from copyright and nothing else.

12 What else do you have?

13 THE COURT: I would submit an order running along
14 the lines of the paragraphs of the complaint I dictated.
15 That would mean there is a proper realignment of the party
16 plaintiff.

17 MR. RIFKIND: I see only one defect, your Honor,
18 in the proposal, and that is the assertion that such a
19 demand ever has been made upon us, which is not in fact
20 accurate.

21 THE COURT: You were served with a summons, were
22 you not?

23 MR. RIFKIND: Yes, attached to a complaint which
24 did not name me as a party. I think that summons was
25 invalidly served.

1 THE COURT: I think there is an authority some-
2 where in FRD that in a case like this an informal request
3 to join is sufficient. You have certainly had that.
4

5 MR. RIFKIND: Mr. Pearsall and his client have
6 never independently urged us to join or suggested that we
7 had any obligation to them whatever.

8 MR. PEARSALL: I think we can dispose of that, your
9 Honor--

10 THE COURT: Write them a letter, send them a
11 telegram.

12 MR. PEARSALL: Right now we will ask CBS to join,
13 right on the spot.

14 THE COURT: He is now asking you on the record
15 to please become a party plaintiff.

16 MR. RIFKIND: Let me suggest one other thought,
17 and that is at least one of the cases your Honor referred
18 to, Eikel, is one of the leading authorities for the
19 proposition that a remedy along the lines of interpleader
20 is appropriate in these circumstances.

21 THE COURT: Well, in some cases, yes. Was Eikel
22 a copyright case? No, it was an admiralty case, wasn't it?

23 MR. RIFKIND: It involved a law firm's legal fees.

24 THE COURT: Yes, but against an admiralty firm.

25 As I see it, there is a separate line of authority

stemming from International Wireless v. RCA and if you don't know that case, you just can't start the whole argument.

That seems to me to lay down a separate line for patent and copyright derivations and makes the distinction between a whole assignment and a partial assignment, or a partial license, a sublicense, and in those cases equity requires the person who retains certain rights and gives certain rights out of his bundle shall protect the transferee or the licensee, and if you cite to me cases that don't involve this particular type of patent or copyright transfer, they are not employed.

MR. RIFKIND: Your Honor, pending study of that, can I understand at least that the disposition of Mr. Pearsall's present application is without prejudice for us to come back and suggest an interpleader or some other remedy is correct?

THE COURT: Certainly. I want something besides you saying "identical issue" and you could come in and make a summary motion on the theory they are not identical, but with this kind of pleading, you can come in and make a motion either to strike the paragraph under 12F or for judgment on the pleadings or summary judgment on the ground that you are not a proper party.

MR. RIFKIND: Very well, your Honor.

THE COURT: That I think can wait until the beginning of September, because there is nothing happening in this case, the television show is running, syndication rights domestically can't possibly arise until after the television is finished, and that may be 1975 or 1976, the way the show is going. Foreign distribution is extremely limited and you take two little countries, like Holland and Finland, and get all excited about \$20. Therefore, while I am not saying I won't in certain circumstances grant a temporary injunction, because there may be other interferences, I don't think, as I indicated before, that anything is burning on the griddle here. Otherwise, I feel embarrassed about going on vacation.

MR. PEARSALL: May I take the next two steps, your Honor? It was my understanding that the way we left it on Monday we were going to combine the preliminary injunction hearing, in effect, with a plenary hearing and we were in fact going to have a trial on September 17th, or thereabouts.

THE COURT: Yes, subject to --

MR. PEARSALL: Subject to whatever it is, right. That is the timetable under which I am presently operating.

THE COURT: We will get a stipulation that we are going to try the whole injunction and discovery is going

to proceed. I don't want arguments that you didn't expect discovery to go on in August.

MR. PEARSALL: On the question of discovery, we have served a notice of deposition commencing on August 20th, to go from witness to witness. We have submitted to your Honor a document demand with an order attached shortening the time within which documents are to be produced, so that we can have the documents in advance of actual conduct of depositions. Would you entertain that order, your Honor?

THE COURT: Can't you agree on it?

MR. SHELTON: I have not seen a copy of it, your Honor.

MR. PEARSALL: Your Honor, we have absolutely shown it to the other side and we have delivered a copy to them.

MR. SHELTON: What do you mean, you have shown it to the other side? Have you delivered it to me?

MR. PEARSALL: It was delivered to Shea, Gould on Friday.

MR. SHELTON: To whose attention? These don't show copies to anybody (indicating). I tell you I have never seen it.

THE COURT: I think in a litigation it is

courtesy to mention counsel's name.

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MR. PEARSALL: We have given them a copy and we will give them another copy.

THE COURT: Sit down and try to straighten it out. If you can't do it, I will straighten it out tomorrow.

On the protective order, I won't change the order now but I will entertain in September any request for changes.

MR. SHELTON: Your Honor will recall that when you signed the order or the stipulation, or whatever it is, in chambers, your Honor said you wanted an order within three days, and that is the reason we got it now.

May I say this: I understand you are going to be submitting another order and complaint now just authorizing the service of a second amended complaint on CBS and I don't understand, and if I am wrong, I would like to know now, that your Honor is going to sign an order ex parte realigning CBS as a party plaintiff?

THE COURT: I have to do that so that CBS can make whatever motion it wishes.

MR. SHELTON: Your Honor doesn't have to do that. After the summons and complaint is served, we can all make our motions. I would make a motion to dismiss for lack of subject matter jurisdiction.

1 THE COURT: It can be done that way too. It
2 comes to the same thing. I will sign an order permitting
3 you to join them in an amended complaint.
4

5 MR. PEARSALL: I would like to submit also
6 a realignment order. We have been over the ground a dozen
7 times and I see no reason for further delay. If Mr.
8 Shelton has reason why it is not appropriate, it should
9 be brought to your Honor's attention immediately.

10 THE COURT: Except that I want to restudy it.
11 I have given them food for thought, and I would do it by
12 Friday, but I won't be here Friday. Everybody gets so
13 excited. Life goes on. It is not that complicated and
14 I want everybody to have a fair chance because there is
15 a problem here, and you better think about it too, arising
16 out of this disclaimer of warranty, and that may make a
17 big difference ultimately in the duties of CBS, and that
18 again, in turn, will raise the question of dealing with
19 itself, and whether it could do that legitimately and
20 properly and whether the only purpose is to simply get them
21 off the hook from some tort action.

22 In other words, you may disclaim sometimes a
23 liability based on a lack of warranty, but it may not
24 include the warranty of title, which is inherent. There
25 can be two types of quit-claim in a copyright situation.

Does CBS think I am wrong in dealing with this as a contract dealing with copyright?

MR. RIFKIND: I must confess, your Honor, I think as a matter of practice in the trade, where things are rather informal, no one attends very closely to the copyright in any of these very important transactions.

THE COURT: Don't all agreements have provisions for clearance both as to territory and title? They all say you have to defend the copyright. I have not seen every agreement, but the common practice in the motion picture industry certainly is to both say that you will give proof of copyright and you will defend the copyright.

MR. RIFKIND: I am not aware of any such provision in the standard television series agreement.

THE COURT: I think if you will think it through, it has to be a statutory copyright or else you have nothing to sell.

MR. PEARSALE: A grantor, regardless of the rights against the rest of the world -- a grantee of an exclusive right always can defend that right against the practices of his immediate grantor, whether it is based on copyright or anything else.

THE COURT: We are not talking about the immediate grantor. We are talking about a superior grantor who claims

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never having relinquished the right to the intermediate grantor.

MR. PEARSALL: Tandem can't attack its own grant, whether you call it copyright or anything else, and I think it is perfectly clear on the face of many cases --

THE COURT: The Supreme Court has now said even in patent you don't have estoppel any more by virtue of a grant. It is strange law, but it is law now for the past two, three years. It is not what we learned in law school.

You have to keep up with the times. There no longer is such a doctrine and Blond Tongue Laboratories is not held -- I would like you to think about it and delve into it because it is, in some respects, a unique case. I will entertain whatever motions are to be made either way, and I will adopt your suggestion in not signing the realignment so that that can be subject to a motion to dismiss for lack of federal jurisdiction in September and then I can decide whether I will dismiss the case or allow CBS to be realigned as a plaintiff, but I want it as a party at that time.

MR. SHELTON: Very good, your Honor.

THE COURT: That doesn't hurt anybody, because whatever preparation you do, if you have to go into the

state court, you just go in.

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MR. PEARSALL: Thank you, your Honor.

THE COURT: The protective order I will leave, the stipulation you will work out today, and I will put a so ordered on it. The time for discovery I will put as so ordered, if you want to, after you agree on it.

The last point is, I will sign an order permitting you to file an amended complaint against CBS but I will not at this time sign an order realigning CBS as a party plaintiff.

**Order That Plaintiff Serve a
Second Amended Complaint**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

VIACOM INTERNATIONAL INC., *et al.*,
Plaintiffs,
against

TANDEM PRODUCTIONS, INC., and COLUMBIA
BROADCASTING SYSTEM, INC.,
Defendants.

IT APPEARING to the Court that Columbia Broadcasting System, Inc. ("CBS") is a person whose presence is needed for a just adjudication as provided by Fed. R. Civ. P. 19 and that it can be served with process,

IT IS ORDERED:

1. That plaintiffs serve and file a Second Amended Complaint, a copy of which is annexed hereto, reflecting the addition of CBS as a party within two days after entry of this Order; and

2. That a copy of said Second Amended Complaint together with a copy of a summons and a copy of this Order be served upon CBS within two days after entry of this Order.

Dated: New York, New York
July 30, 1973

s/ M. I. GURFEIN
U.S.D.J.

Second Amended Complaint

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Plaintiffs, by their attorneys, Hughes Hubbard & Reed, complaining of defendant, allege:

1. Plaintiff Viacom International Inc. ("Viacom ") is a corporation duly organized and existing under the laws of the State of Delaware, having its principal place of business in the Southern District of New York at 345 Park Avenue, New York, New York. Viacom is engaged in the business of distributing and licensing television programming to television stations by means other than network exhibition. Such off-network distribution and licensing is commonly known as "syndication."

2. Plaintiff Viacom Latino Americana Inc. is a corporation duly organized and existing under the laws of the State of New York, having its principal place of business in Miami, Florida.

3. Plaintiff Viacom Japan Inc. is a corporation duly organized and existing under the laws of the State of New York, having its principal place of business in Tokyo, Japan.

4. Plaintiff Viacom Canada Limited is a corporation duly organized and existing under the laws of the Dominion of Canada, having its principal place of business in Toronto, Ontario, Canada.

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5. Plaintiff Viacom Video-Audio Comunicacoes Limitada is a corporation duly organized and existing under the laws of Brazil, having its principal place of business in Sao Paulo, Brazil.

6. Plaintiff Viacom International Limited is a corporation duly organized and existing under the laws of the United Kingdom, having its principal place of business in London, England.

7. Plaintiff Viacom S.A. is a corporation duly organized and existing under the laws of Switzerland, having its principal place of business in Zug, Switzerland.

8. Plaintiff Viacom International Pty. Limited is a corporation duly organized and existing under the laws of the Australian Capital Territory, having its principal place of business in Sydney, Australia.

9. Each of the plaintiffs other than Viacom is a wholly-owned subsidiary of Viacom and is engaged in the business of syndication outside the United States. Collectively, Viacom and such subsidiaries comprise a worldwide syndication organization ("Viacom International").

10. On information and belief, defendant Tandem Productions, Inc. ("Tandem") is a corporation duly organized and existing under the laws of the State of California, having its principal place of business at 1901 Avenue of the Stars, Los Angeles, California. Tandem is engaged in the business of producing television programming.

11. Columbia Broadcasting System, Inc. ("CBS"), is a corporation duly organized and existing under the laws of the State of New York, having its principal place of business at 51 West 52nd Street, New York, New York.

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12. This is an action for preliminary and permanent relief, damages, and a declaratory judgment pursuant to Title 28 U.S.C. §2201 determining the actual controversies described herein.

13. Personal jurisdiction over Tandem is conferred by §§302(a)(1), (2) and (3) of the New York Civil Practice Law and Rules in that the claims alleged herein arise from the facts that

(a) Tandem has transacted business within the State of New York,

(b) Tandem has committed tortious acts within the State of New York, and

(c) Tandem has committed tortious acts without the State of New York causing injury to Viacom International and its property within said State, has at all relevant times regularly done and solicited business and engaged in other persistent courses of conduct in said State, has expected and should reasonably have expected such tortious acts to have consequences in said State and has derived substantial revenue from goods used and consumed and services rendered in said State and from interstate and international commerce.

14. Subject matter jurisdiction is based upon diversity of citizenship, and the matter in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand Dollars (\$10,000).

15. Viacom was incorporated in August 1970 as a wholly-owned subsidiary of CBS. It was established in response to certain regulations adopted by the Federal Communications Commission ("FCC"), including the reg-

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ulation prohibiting television networks from engaging in the business of syndication. CBS' syndication business for many years had been conducted by its wholly-owned subsidiary, CBS Enterprises, Inc. ("CBS Enterprises"). CBS arranged to divest itself of such business through a spin-off transaction (the "spin-off") whereby it would transfer its syndication rights to Viacom, merge CBS Enterprises into Viacom, and distribute all of the capital stock of Viacom to the CBS shareholders.

16. In connection with the spin-off CBS and Viacom entered into an agreement as of December 31, 1970 (the "Syndication Agreement"). Under the Syndication Agreement CBS agreed *inter alia* to assign, transfer and convey exclusively to Viacom all of the rights it then possessed or thereafter acquired to syndicate in the United States and in foreign countries programs and program series initially broadcast over the CBS Television Network ("CBS-TV") during the 1970-71 or 1971-72 broadcast seasons, and Viacom agreed *inter alia* to make certain payments to CBS and to use its diligent and vigorous efforts to syndicate such programs and program series worldwide on the most advantageous terms possible. To enable Viacom to exercise the assigned syndication rights, the Syndication Agreement provided *inter alia* that CBS would furnish Viacom with film prints, color internegatives, music, effects and dialogue tracks and duplicate video tapes as ordered by Viacom from time to time.

17. The Viacom spin-off was originally scheduled to be consummated on December 31, 1970. The FCC, however, on that date stayed the spin-off until June 4, 1971 when it issued an order approving the transaction and dissolving its stay. Immediately thereafter, on June 4, 1971, the spin-off was consummated with the result that on that date the Syn-

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dication Agreement was delivered and became operative, CBS Enterprises merged into Viacom, and Viacom commenced business as a wholly independent, publicly-held corporation.

18. Tandem is the producer of the popular television series "ALL IN THE FAMILY" which is currently broadcast at 8:00 p.m. each Saturday over CBS-TV. Following negotiations and related activities commencing in the first half of 1970 which in material part were conducted by Tandem and its agents in the State of New York, CBS and Tandem entered into an agreement regarding ALL IN THE FAMILY (the "Tandem Agreement") which was memorialized in writing and became effective as of July 10, 1970. Tandem agreed *inter alia* to license to CBS certain exhibition rights in ALL IN THE FAMILY and, in addition, to assign, transfer and convey exclusively to CBS all of the rights it then possessed or thereafter acquired to syndicate ALL IN THE FAMILY in the United States, its territories and possessions, and in foreign countries (the "Syndication Rights"). CBS agreed *inter alia* to pay Tandem the net profits derived from exercise of the Syndication Rights after deduction of its standard distribution fees and all distribution expenses. The Tandem Agreement further provided that CBS was entitled to assign its rights thereunder in full or in part to any person, firm or corporation provided that no such assignment would relieve CBS of its obligations thereunder.

19. On information and belief, after CBS and Tandem entered into the Tandem Agreement, Tandem and its agents continued to transact business in the State of New York in connection with furthering its purposes and carrying out its terms.

20. In January 1971, CBS-TV commenced broadcasting ALL IN THE FAMILY. Since ALL IN THE FAMILY was thus

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initially broadcast over CBS-TV during the 1970-71 broadcast season Viacom, upon delivery of the Syndication Agreement on June 4, 1971 and pursuant to its terms, became the sole owner of the Syndication Rights and entitled to the exclusive enjoyment thereof on and after that date. The Syndication Agreement provides that Viacom's gross receipts from its exercise of the Syndication Rights, less specified distribution fees and certain direct distribution costs which Viacom is entitled to recoup, are to be paid to CBS. Since under the Tandem Agreement CBS is to pay to Tandem an amount equivalent to that which under the Syndication Agreement Viacom is to pay to CBS, all of the net proceeds derived by Viacom from exercise of the Syndication Rights after deduction of Viacom's distribution fees and costs are, in effect, payable to Tandem.

21. As alleged in paragraphs 18 and 20 hereof, CBS conveyed to Viacom the exclusive right to license others to cause television broadcasts of ALL IN THE FAMILY by means other than the facilities of the CBS Television Network, such right constituting a part of the rights granted by Tandem to CBS under the Tandem Agreement. CBS is under an obligation to support or defend Viacom's title to the Syndication Rights thus conveyed by CBS to Viacom. CBS has been requested to do so but has refused. Accordingly, it is incumbent upon CBS to join in this action as a plaintiff and for its failure and refusal to do so, it is hereby named a defendant. Since the real and true interest of CBS in this action is aligned with and not adverse to that of Viacom, CBS should be realigned as a plaintiff.

22. ALL IN THE FAMILY is a unique and highly successful television series. Hailed from its inception as a "complete breakthrough", the show is a situation comedy which examines bigotry and other controversial matters with a

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realism never before screened in American homes. Not only have "Archie Bunker", the hero of the series, and "Archie Bunker country" become everyday household terms but the show has won many important awards and for more than two years has consistently ranked at the top of the national ratings.

23. The syndication industry is highly competitive. Viacom International's prestige and competitive strength in this industry depend entirely upon its identification with and ability to offer top ranked shows. The exclusive right to syndicate *ALL IN THE FAMILY* throughout the world enhances Viacom International's reputation in the marketplace as a quality syndicator, and hence has a value to Viacom International far greater than the specific dollars it represents in fees.

24. When in January 1971 CBS-TV commenced broadcasting *ALL IN THE FAMILY*, CBS simultaneously authorized CBS Enterprises to initiate foreign syndication of the program. CBS Enterprises promptly organized a sales and promotion campaign which it pursued until the spin-off on June 4, 1971. From that date to the present time Viacom, as assignee of the Syndication Rights and successor by merger to CBS Enterprises, directly and through its authorized subsidiaries, has diligently, vigorously and successfully carried forward and expanded this campaign. Viacom International's investment in this campaign, and in the sales made and to be made as a result thereof, is measured not only by its cost in money but by the human expenditure of time, energy and creative effort on the part of a dedicated worldwide marketing organization. As the result of this tangible and intangible investment in *ALL IN THE FAMILY*, Viacom International has contributed material value to the Syndication Rights and has created for

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them an advantageous market in which their profit potential for both Viacom International and Tandem can be maximized.

COUNT ONE

25. Each and every allegation contained in paragraphs 1 through 24 above is repeated and realleged as if fully set forth herein.

26. Notwithstanding that Viacom is the lawful owner of the Syndication Rights, Tandem claims such ownership and is arranging and threatening to arrange to syndicate or cause unknown third parties to syndicate ALL IN THE FAMILY in violation of Viacom's rights. Unless Viacom's title to the Syndication Rights is quieted and Tandem, its officers, agents, servants, employees, attorneys and all those persons in active concert or participation with them are immediately restrained and enjoined from dealing with the Syndication Rights in any manner not authorized by Viacom, Viacom International will suffer grave, immediate, and irreparable injury for which there is no adequate remedy at law in that, among other things,

(a) Viacom International will be deprived of the exclusive enjoyment of a unique, important and valuable property right for which, by its nature, no equivalent replacement or substitute exists;

(b) Viacom International will suffer a substantial and material loss of reputation, credibility and, hence, competitive strength in the syndication industry;

(c) The market will be confused as to the lawful source of exhibition rights for ALL IN THE FAMILY with the result that the Syndication Rights will suf-

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fer a substantial and material loss of marketability and value;

(d) Litigation with resultant judicial and economic waste will be engendered between Viacom International and any competitor wrongfully authorized by Tandem to syndicate *ALL IN THE FAMILY*, between Viacom International and the licensees of such competitor, between such competitor and the licensees of Viacom International and between the competing licensees of Viacom International and such competitor; and

(e) Viacom International will lose the fruits of the intangible asset created by its expenditure of time, energy and creative effort in promoting and building the syndication market for *ALL IN THE FAMILY*.

Viacom International cannot be fully compensated by the award of money damages for any of the injuries set forth in paragraph 26 above.

27. By reason of Tandem's wrongful claim to, and dealings in respect of, the Syndication Rights, Tandem has been unjustly enriched and has caused Viacom International loss and damages in amounts which can only be determined on the trial of this action.

COUNT TWO

28. Each and every allegation contained in paragraphs 1 through 24 and 26 above is repeated and realleged as if fully set forth herein.

29. Under the Tandem Agreement, Tandem covenanted and agreed in connection with the Syndication Rights that

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it would deal fairly and in good faith with CBS or its assignee and would refrain from doing anything which would have the effect of destroying, defeating or injuring the right of CBS or its assignee to receive the fruits of such agreement.

30. Tandem has breached the Tandem Agreement by, among other things, wrongfully asserting ownership of the Syndication Rights and wrongfully dealing with such Syndication Rights as its own in violation of Viacom's rights as assignee thereof.

31. By reason of such breach,

(a) Viacom International is entitled to the immediate injunctive relief described in paragraph 24 above; and

(b) Tandem has been unjustly enriched and has caused Viacom International loss and damages, in amounts which can only be determined on the trial of this action.

COUNT THREE

32. Each and every allegation contained in paragraphs 1 through 24 and 26 above is repeated and realleged as if fully set forth herein.

33. Tandem, with full and complete knowledge of the Syndication Agreement and Viacom's exclusive rights thereunder, has intentionally and unjustifiably interfered with

(a) Viacom's contractual relations with CBS,
and

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(b) Viacom International's contractual relations with the foreign licensees of ALL IN THE FAMILY, by assuming and appropriating to its own use the Syndication Rights.

34. Unless Tandem, its officers, agents, servants, employees, attorneys and all those persons in active concert or participation with them are immediately restrained and enjoined from interfering with the contractual relations described in paragraph 33 above, Viacom International will suffer grave, immediate and irreparable injury for which there is no adequate remedy at law in the respects, among others, described in paragraph 24 above.

35. By reason of Tandem's wrongful conduct, alleged above, Tandem has been unjustly enriched and has caused Viacom International loss and damages in amounts which can only be determined on the trial of this action.

COUNT FOUR

36. Each and every allegation contained in paragraphs 1 through 24, 26, 29, 30 and 33 above is repeated and re-alleged as if fully set forth herein.

37. Tandem, with full and complete knowledge of the Syndication Agreement and Viacom's exclusive rights thereunder, and by wrongfully using its economic leverage as producer of ALL IN THE FAMILY and other important programs broadcast over CBS-TV, has intentionally and unjustifiably prevented Viacom from receiving the prints, tapes and other materials necessary for Viacom International's exercise of the Syndication Rights.

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38. Tandem has intentionally and unjustifiably engaged in unfair competition against Viacom International.

39. Unless Tandem, its officers, agents, servants, employees, attorneys and those persons in active concert or participation with them are immediately restrained and enjoined from engaging in such unfair competition, Viacom International will suffer grave, immediate, and irreparable injury for which there is no adequate remedy at law in the respects, among others, described in paragraph 26 above.

40. By reason of Tandem's wrongful conduct, alleged above, Tandem has been unjustly enriched and has caused Viacom International loss and damages in amounts which can only be determined on the trial of this action.

WHEREFORE, plaintiff demands that they have judgment against Tandem

(a) on Count One declaring that Viacom is the lawful owner of, and settling its title to, the Syndication Rights;

(b) on Counts One, Two, Three and Four preliminarily and permanently restraining and enjoining the wrongful conduct alleged therein;

(c) on Counts One, Two, Three and Four requiring that Tandem account to plaintiffs for its profits, and pay plaintiffs' loss and damages, resulting from the wrongful conduct alleged therein in the amounts determined upon the trial of this action;

(d) for interest on the amounts demanded by Counts One, Two, Three and Four;

(e) for the costs and disbursements of this action; and

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(f) for such other, further and different relief
as to the Court may seem just and proper.

Dated: New York, New York
July 30, 1973

HUGHES HUBBARD & REED

By OTIS PRATT PEARSALL

A Partner

Attorneys for Plaintiffs

Viacom International Inc.,
Viacom Latino Americana Inc.,
Viacom Japan Inc., Viacom
Canada Limited, Viacom Video-
Audio Comunicacoes Limited,
Viacom International Limited,
Viacom S.A. and Viacom
International Pty. Limited

One Wall Street
New York, New York 10005
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Answer to Second Amended Complaint

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Defendant, Tandem Productions, Inc., ("Tandem"), by its attorneys, Shea Gould Climenko & Kramer, for its answer to the second amended complaint ("the complaint"):

FIRST DEFENSE

1. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs "2", "3", "4", "5", "6", "7", "8", "9", "11", "15" and "17" of the complaint.
2. Admits the allegations contained in paragraphs "10" and "22" of the complaint.
3. Denies each and every allegation contained in paragraphs "13", "14", "19", "27", "30", "31", "33", "34", "35", "37", "38", "39", and "40".
4. Answering paragraph "1" of the complaint, denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in the first sentence thereof and admits on information and belief the allegations contained in the remainder of paragraph "1" of the complaint.
5. Answering paragraph "12" of the complaint, admits that plaintiffs purport to bring this action pursuant to the statutes and for the relief referred to therein.

Answer to Second Amended Complaint

6. Answering paragraph "16" of the complaint, denies each and every allegation contained therein, except admits on information and belief that a certain agreement was made "as of the 31st day of December, 1970," by and between CBS Television Network and Viacom Enterprises and respectfully refers the Court to such agreement for the full and complete terms and provisions thereof.

7. Answering paragraph "18" of the complaint, admits the allegations contained in the first sentence thereof, and denies each and every other allegation contained therein, except avers that in or about September, 1971, Tandem executed a Memorandum of Agreement "dated as of July 10, 1970" between Tandem and CBS Television Network ("the July 10, 1970 Memorandum") which was modified by a letter agreement dated July 21, 1971 and by a letter agreement dated August 26, 1971 between the same parties, and respectfully refers the Court thereto for the full and complete terms and provisions thereof and alleges that insofar as such agreement was contrary to law, as described below, it was and is null and void.

8. Answering paragraph "20" of the complaint, admits the allegations contained in the first sentence thereof, denies each and every other allegation contained therein, and respectfully refers the Court to the agreement between CBS Television Network and Viacom Enterprises dated as of the 31st day of December, 1970, referred to in paragraph "6" above, and to the July 10, 1970 Memorandum for the full and complete terms and provisions thereof, and alleges that insofar as the alleged agreement set forth in the July 10, 1970 Memorandum was contrary to law, as described below, it was and is null and void.

9. Answering paragraph "21" of the complaint, admits upon information and belief the allegations contained in the

Answer to Second Amended Complaint

third sentence thereof, and denies each and every other allegation contained therein, except respectfully refers the Court to the agreement between CBS Television Network and Viacom Enterprises dated as of the 31st day of December, 1970, referred to in paragraph "6" above for the full and complete terms and provisions thereof.

10. Answering paragraph "23" of the complaint, admits the allegations contained in the first sentence thereof and denies each and every other allegation contained therein.

11. Answering paragraph "24" of the complaint, denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in the first two sentences thereof and denies each and every other allegation contained therein.

12. Answering paragraph "26" of the complaint, Tandem denies each and every allegation contained therein, except admits that it claims to be the owner of the "Syndication Rights" and that it has the right to "syndicate" ALL IN THE FAMILY itself or through any agent of its own choosing or to dispose of or deal with the "Syndication Rights" as it sees fit.

13. Answering paragraph "29" of the complaint, Tandem denies each and every allegation contained therein, except refers to the July 10, 1970 Memorandum for the full and complete terms and provisions thereof, and alleges that insofar as the alleged agreement set forth in the July 10, 1970 Memorandum was contrary to law, as described below, it was and is null and void.

14. Answering paragraphs "25", "28", "32", and "36" of the complaint, Tandem repeats and realleges each

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and every denial and averment set forth above with respect to the paragraphs of the complaint referred to therein.

SECOND DEFENSE

15. This Court lacks jurisdiction over the person of defendant Tandem.

THIRD DEFENSE

16. This Court lacks jurisdiction over the subject matter of this action.

FOURTH DEFENSE

17. The complaint fails to state a claim against Tandem upon which relief can be granted.

FIFTH DEFENSE

18. Defendant Columbia Broadcasting System, Inc. ("CBS") owns and operates commercial television stations in five of the nation's leading television markets: New York City, New York; Los Angeles, California; Chicago, Illinois; Philadelphia, Pennsylvania; and St. Louis, Missouri. CBS is engaged in, among other things, the operation of the CBS television network, which furnishes television programs and related advertising messages to approximately 200 affiliates (television stations required by contract to carry CBS network programming during all or substantially all of the prime evening hours, i.e., the hours between 6:00 P.M. and 11:00 P.M. during which television attracts its largest audience) located throughout the United States and to the television stations which are owned and operated by CBS.

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19. Television programs and related advertising messages, filmed, video taped and live, are conveyed by program suppliers and networks across state lines to television stations throughout the United States, from which stations said programs are transmitted across state lines to viewers. A continuous stream of interstate commerce and the use of interstate means of communication results therefrom, including the collection and payment of fees, voluminous written and frequent verbal communications, and substantial amounts of advertising copy, recordings, transcriptions, films, contracts and checks.

20. Commercial television programs are created and produced by television networks, outside program suppliers, television stations, and by motion picture studios, which supply feature films and other programs for television broadcast. In 1969, the three nationwide commercial television networks (CBS, National Broadcasting Company ("NBC") and American Broadcasting Company ("ABC")) spent more than \$840,000,000 for television programs, of which CBS spent more than \$250,000,000. In 1969, total television broadcasting revenues for the aforementioned three networks were in excess of \$1,510,000,000 of which CBS received more than \$520,000,000.

21. The value of any television program to its producer and to an advertiser whose message is broadcast in conjunction with it, depends in large part on the number of television viewers who see the program and observe the commercial messages. The largest television audiences in the United States are readily available only to those producers whose programs are carried by the CBS, NBC or ABC television networks, and to those advertisers whose commercial messages are broadcast during said programs, and the right to broadcast such programs and commercial

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messages or any of these three television networks can be purchased only from them. The three nationwide commercial television networks (CBS, NBC and ABC) control access to the prime evening hours and constitute the primary market for television entertainment programs.

22. The commercial value of a television entertainment program is not exhausted by its first network showing. A television entertainment program may be syndicated to foreign television stations while it is appearing over a domestic television network, and syndicated to individual television stations in the United States for non-network broadcasts following the network run of the program. As is more fully described below, CBS has obtained syndication, and other valuable subsidiary program rights, as well as a share of the profits produced by such rights, with respect to a substantial number of television entertainment programs produced by others and broadcast on the CBS Television Network.

23. For many years prior to the date hereof and continuing up to and including at least September 1971, in violation of the laws of the United States and the State of New York and pursuant to combinations and conspiracies between CBS and others, in unreasonable restraint of trade and in an attempt to monopolize trade and commerce with respect to the production, distribution, ownership, broadcasting syndication and exploitation of television entertainment programs broadcast initially on the CBS Television Network during prime evening hours, defendant CBS has used its control over access to the broadcasting time of the CBS Television Network during prime evening hours:

(a) To exclude television entertainment programs in which CBS has no ownership, financial or proprietary in-

Answer to Second Amended Complaint

terests from broadcasting on the CBS Television Network during prime evening hours;

(b) To compel independent program suppliers such as Tandem to grant to it or to plaintiff financial and proprietary interests in television entertainment programs produced by them;

(c) To compel independent program suppliers such as Tandem to grant to it or to plaintiff exclusive syndication rights in television entertainment programs produced by them.

24. As a result of the conduct described above:

(a) Ownership and control of television entertainment programs broadcast initially during prime evening hours on the CBS Television Network has been concentrated in CBS;

(b) Competition in the production, distribution, ownership, broadcasting, syndication and exploitation of television entertainment programs has been unreasonably restrained;

(c) Competition in the sale of television entertainment programs to the CBS Television Network by outside program suppliers has been unreasonably restrained;

(d) CBS and Viacom have monopolized or attempted to monopolize the production, distribution, ownership, broadcasting syndication and exploitation of television entertainment programs broadcast initially during the prime evening hours on the CBS Television Network; and

(e) The viewing public has been deprived of the benefits of free and open competition in the broadcasting of television entertainment programs.

Answer to Second Amended Complaint

25. By the terms of the July 10, 1970 Memorandum, CBS compelled Tandem to grant to it, and CBS conditioned Tandem's access to CBS' television Network during prime evening hours upon the granting to it of rights to syndicate and distribute ALL IN THE FAMILY on free television (including cable television) in all territories secured by Tandem (including, without limitation, the broadcast area, i.e., the United States, its territories and possessions (including Puerto Rico), Bermuda and Antigua, Canada, Great Britain and West Germany) at CBS' "standard distribution fees" in the amount of 40% of all gross receipts derived from foreign distribution, 40% of all gross receipts derived from domestic "station-to-station" distribution, 25% of all gross receipts derived from domestic regional distribution and 10% of all gross receipts derived from domestic network distribution.

26. By reason of the foregoing, the alleged agreement set forth in the July 10, 1970 Memorandum by which CBS allegedly acquired the exclusive right to syndicate or distribute ALL IN THE FAMILY was and is illegal and null, void and of no effect.

SIXTH DEFENSE

27. On May 4, 1970, the Federal Communication Commission ("FCC") adopted rules prohibiting the three national television networks from engaging in syndication and from acquiring any financial or proprietary interest in television programs of which the networks are not the sole producers. The rules provided that the networks could not:

"After September 1, 1970, acquire any financial or proprietary right or interest in the exhibition, distribution or other commercial use of any television program produced wholly or in part by a person

Answer to Second Amended Complaint

other than such television network, except the license or other exclusive right to network exhibition within the United States and on foreign stations regularly included within such television network; provided that if such network does not timely avail itself of such license or other exclusive right to network exhibition within the United States, the grantor of such license or right to network exhibition may, upon making a timely offer reasonably to compensate the network, reacquire such license or other exclusive right to exhibition of the program."

By amendment, the effective date of the rule quoted above was changed to October 1, 1970.

28. The alleged agreement between Tandem and CBS Television Network pursuant to which CBS allegedly acquired the right to syndicate and distribute ALL IN THE FAMILY in domestic and foreign syndication was not concluded until after October 1, 1970.

29. By reason of the foregoing, that provision of the alleged agreement between CBS Television Network and Tandem which gave CBS any financial or proprietary right or interest in the exhibition, distribution or other commercial use of ALL IN THE FAMILY, except the license or other exclusive right to network exhibition within the United States and on foreign stations regularly included within such television network was contrary to the rules of the FCC, illegal, null, void and of no effect.

SEVENTH DEFENSE

30. If this Court should determine that the July 10, 1970 Memorandum is valid and enforceable, which Tandem denies, then the exclusive right to syndicate ALL IN THE FAMILY provided for in paragraph 12 thereof was condi-

Answer to Second Amended Complaint

tioned upon and made in consideration of the implied agreement of CBS to use its experience, resources, ability, economic power and best efforts to promote and exploit ALL IN THE FAMILY by syndication for Tandem's benefit and profit.

31. Under the express terms of the July 10, 1970 Memorandum CBS could not relieve itself of any of those obligations.

32. In breach of its obligation, CBS has failed to promote and exploit ALL IN THE FAMILY for Tandem's benefit and profit by failing to use its experience, resources, ability, economic power and best efforts to do so, and, in fact, by reason of the adoption and promulgation of rules by the FCC which prohibit the television networks, including CBS, from engaging in the business of syndicating or distributing television programs, CBS cannot perform its obligation to promote and exploit the rights for Tandem's benefit and profit.

33. By reason of the foregoing, there has been a failure of the consideration which was to be given to Tandem in return for Tandem's agreement to make CBS the sole and exclusive syndicator of ALL IN THE FAMILY.

EIGHTH DEFENSE

34. If this Court should determine that paragraph 12 of the July 10, 1970 Memorandum is valid and binding, which Tandem denies, then the provision contained in such paragraph, purporting to give CBS the exclusive right to syndicate ALL IN THE FAMILY, was conditioned upon and included in reliance upon CBS' particular ability, based on its experience, resources and economic power, to promote

Answer to Second Amended Complaint

ALL IN THE FAMILY by syndication for Tandem's benefit and profit.

35. By reason of the foregoing, the syndication and distribution rights purportedly given to CBS by Tandem could not be assigned by CBS.

NINTH DEFENSE

36. Simultaneously with the July 10, 1970 Memorandum and the letter agreement dated July 21, 1971, the parties thereto entered into a letter agreement dated August 26, 1971, which provided that notwithstanding the provisions of paragraph 12 of the July 10, 1970 Memorandum CBS would agree and consent to Tandem's entering into a separate agreement with Viacom providing for the exercise and/or exploitation of the syndication rights and that such separate agreement, on being finalized, would be deemed to supersede and replace the provisions or paragraph 12 of the July 10, 1970 Memorandum and any provisions thereof with respect to syndication rights.

37. At the time of the execution of the July 10, 1970 Memorandum the parties thereto believed and expected that a separate agreement would be entered into with respect to syndication rights to ALL IN THE FAMILY between Tandem and Viacom. It was not within the contemplation of the parties and the parties did not intend that the syndication rights would be assignable by CBS.

TENTH DEFENSE

38. Tandem repeats and realleges each and every allegation contained in paragraph 36 hereof with the same force and effect as though fully set forth.

Answer to Second Amended Complaint

39. Tandem and Viacom entered into a working arrangement pursuant to which Viacom was authorized to exercise the foreign syndication rights to ALL IN THE FAMILY after advance consultation with Tandem. Pursuant to the working arrangement, Viacom was required to meet certain minimum sales levels, to account periodically to Tandem for all proceeds and costs of its ALL IN THE FAMILY syndications, and to furnish Tandem with a detailed memorandum of each distribution or licensing deal made by Viacom for ALL IN THE FAMILY.

40. Such working arrangement, pursuant to the terms of the letter agreement dated August 26, 1971 between Tandem and CBS, superseded and replaced the provisions of paragraph 12 and any other provisions of the July 10, 1970 Memorandum with respect to syndication rights.

41. Viacom breached the provisions of such working arrangement by failing to meet minimum sales requirements, by failing to make proper accountings and by failing to consult with Tandem in advance of making syndication arrangements for ALL IN THE FAMILY.

42. By reason of Viacom's breaches of the working arrangement, Tandem terminated the arrangement by written notice to Viacom on March 26, 1973.

ELEVENTH DEFENSE

43. Even if paragraph 12 of the July 10, 1970 Memorandum is held to be valid and binding, which Tandem denies, the alleged agreement to make CBS the sole syndication of ALL IN THE FAMILY was not for a fixed or determinable duration, nor did paragraph 12 contain an express provision that the duration was to be perpetual, and therefore, such alleged agreement was terminable at will.

Answer to Second Amended Complaint

44. The alleged agreement was terminated by Tandem by written notice given to Viacom, CBS' alleged assignee, on March 26, 1973.

TWELFTH DEFENSE

45. By the terms of the agreement between CBS and Viacom made as of December 31, 1970, the right to syndicate ALL IN THE FAMILY, if CBS ever possessed such right, which Tandem denies, was not assigned to Viacom and has not otherwise been assigned to Viacom.

WHEREFORE, Tandem demands judgment herein dismissing the complaint, together with the costs and disbursements of this action and such other and further relief as to this Court shall seem just and proper.

SHEA GOULD CLIMENKO & KRAMER

By M(89)& I. Shelton

A Member of the Firm
Attorneys for Defendant Tandem
Productions, Inc.
330 Madison Avenue
New York, New York 10017
Telephone: (212) 661-3200

**Notice of Motion Pursuant to Rules 12(c), 12(f),
12(h) (2) and 56, Dated September 7, 1973, to
Dismiss the Fifth Defense**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of Otis Pratt Pearsall, sworn to September 7, 1973, the annexed affidavit of Cornelius Sullivan, sworn to September 7, 1973, and upon all the pleadings and proceedings heretofore had in this action, the undersigned will move before the Hon. Murray I. Gurfein of this Court, in courtroom 2904, United States Courthouse, Foley Square, New York, New York, on the 17th day of September 1973, at 10:00 o'clock A.M. or as soon thereafter as counsel may be heard, for an order pursuant to Fed. R. Civ. P. 12(c), 12(f), 12(h)(2) and 56:

(a) dismissing the "FIFTH DEFENSE" asserted by defendant Tandem Productions, Inc., in its answer to the second amended complaint herein; and

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Notice of Motion

(b) granting such other, further and different relief as to the Court may seem just and proper.

Dated: New York, New York
September 7, 1973

HUGHES HUBBARD & REED

By Otis Pratt Pearsall

A Member Of The Firm
Attorneys for Plaintiffs
One Wall Street
New York, New York 10005
(212) 943-6500

To:

SHEA GOULD CLIMENKO & KRAMER
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330 Madison Avenue
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CRAVATH, SWAINE & MOORE
Attorneys for
Columbia Broadcasting System, Inc.
One Chase Manhattan Plaza
New York, New York 10005

**Statement Under Rule 9(g) of the General Rules
of the United States District Court for the
Southern District of New York**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

The following are the material facts as to which plaintiffs, the moving parties herein, contend there is no genuine issue to be tried:

1. On June 4, 1971 the spin-off transaction by which Columbia Broadcasting System, Inc. ("CBS") divested itself of its syndication business to Viacom International Inc. ("Viacom") was effectuated.
2. CBS entered into an agreement dated as of July 19, 1970 with Tandem Productions, Inc. ("Tandem") relating to the production, network broadcast and syndication of the television show entitled ALL IN THE FAMILY (the "Tandem Agreement") of which Pearsall Aff. Ex. A* is a true copy.
3. CBS and Tandem entered into an amendment dated July 21, 1971 of the Tandem Agreement of which Pearsall Aff. Ex. B is a true copy.
4. Network broadcast of ALL IN THE FAMILY commenced in January 1971 and has continued to date.
5. Tandem received total license fees of \$1,176,500 for the 1970-1971 season, having been paid at the rate of \$72,500 for 13 new programs and \$18,000 for 13 repeats.
6. Pursuant to ¶14 of the Tandem Agreement, Tandem received reimbursement of certain "below-the-line" ex-

* References to the "Pearsall Aff." are to the affidavit of Otis Pratt Pearsall sworn to September 7, 1973, submitted in support of this motion.

Statement Under Rule 9(g) of the General Rules

penses in excess of an average of \$5,000 per program for the 13 programs in the 1970-1971 season.

7. Pursuant to ¶4 of the Tandem Agreement, Tandem received reimbursement of certain pre-production expenses in the amount of \$12,000.

8. Tandem received total license fees of at least \$2,370,000 for the 1971-1972 season, having been paid at the rate of at least \$80,750 for 24 new programs and at least \$18,000 for 24 repeats.

9. Tandem received total license fees of at least \$2,430,000 for the 1972-1973 season, having been paid at the rate of at least \$82,500 for 24 new programs and at least \$18,750 for 24 repeats.

10. Tandem has been successful in renegotiating the Tandem Agreement to increase the license fees beyond those shown in Pearsall Aff. Exs. A and B.

11. Pursuant to ¶12 of the Tandem Agreement, Tandem received \$16,000 in consideration of its best efforts to secure syndication and distribution rights in additional foreign areas.

12. As a result of Viacom's foreign syndication of ALL IN THE FAMILY, Tandem has received \$105,925.23 as the producer's share of receipts from foreign syndication.

Dated: New York, New York
September 7, 1973

HUGHES HUBBARD & REED

By Otis Prass Pearsall

A Member Of The Firm
Attorneys for Plaintiffs
One Wall Street
New York, New York 10005
(212) 943-6500

**Affidavit of Otis Pratt Pearsall Dated September 7,
1973, in Support of the Motion to Dismiss
the Fifth Defense**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

OTIS PRATT PEARSALL, being duly sworn, deposes and
says:

1. I am a member of the firm of Hughes Hubbard & Reed, attorneys for plaintiffs, am a member of the bar of this Court, and am familiar with the facts and proceedings in this action.

2. I make this affidavit in support of plaintiffs' motion to dismiss the "FIFTH DEFENSE" asserted by defendant Tandem Productions, Inc. ("Tandem") in its answer to the second amended complaint.

3. On or about July 10, 1970, Columbia Broadcasting System, Inc. ("CBS") entered into an agreement with Tandem relating to the production, network broadcast and syndication of the television show entitled ALL IN THE FAMILY (the "Tandem Agreement"). A true copy of the Tandem Agreement is annexed hereto as Exhibit A.*

4. CBS and Tandem entered into an amendment of the Tandem Agreement dated July 21, 1971 (the "July 21,

* The copy annexed is a more legible duplicate of the copy marked as Exhibit 65 during the course of the depositions in this action.

Affidavit of Otis Pratt Pearsall

1971 Amendment"). A true copy of the July 21, 1971 Amendment is annexed hereto as Exhibit B.

5. The primary consideration for Tandem's performance under the Tandem Agreement was network broadcast of ALL IN THE FAMILY and the payment of license fees. Network broadcast commenced in January 1971 and has continued to date. Tandem has been paid the license fees due under the Tandem Agreement as amended by the July 21, 1971 Amendment (Deposition of Norman M. Lear pp. 148-49, annexed hereto as Exhibit C).

6. During the 1970-1971 season, Tandem received an advance in the amount of \$109,902.97 against first-year license fees (Exhibit A ¶4; Ex. 112*, annexed hereto as Exhibit D; Deposition of James W. Hayes p. 34, annexed hereto as Exhibit E). Paid at the rate of \$72,500 per new program and \$18,000 per repeat, Tandem received a total of \$942,500 in license fees for 13 new programs and \$234,000 for 13 repeats (see Exhibits A and C). Thus, Tandem received total license fees of \$1,176,500 for the 1970-1971 season.

7. Tandem also received reimbursement of expenses incurred in connection with the 1970-1971 season. Thus, pursuant to ¶14 of the Tandem Agreement, Tandem was entitled to receive up to an average of \$7,500 per program in reimbursement of certain "below-the-line" expenses, (Exhibit A ¶14) and it was actually reimbursed in excess of an average of \$5,000 per program. Calculating on the basis of an average of \$5,000, Tandem received \$65,000 of reimbursement for these expenses. Pursuant to ¶4 of the Tandem Agreement, Tandem received reimbursement

* References to "P. Ex." are to the exhibits marked by plaintiffs in the course of the depositions herein.

Affidavit of Otis Pratt Pearsall

of certain pre-production expenses in the amount of \$12,000 (Exhibit A ¶4; P. Exs. 18, 103 and 113 which are annexed hereto as Exhibit F; Exhibit E). Thus, Tandem received total reimbursement of expenses in excess of \$77,000 for the 1970-1971 season.

8. During the 1971-1972 season, Tandem received license fees of at least \$80,750 per new program and at least \$18,000 per repeat (Exhibits A, B and C). Thus, for the 24 episodes in this season, Tandem received \$1,938,000 in new-program license fees plus \$432,000 in repeat-program license fees for a total of at least \$2,370,000.

9. During the 1972-1973 season, Tandem received license fees of at least \$82,500 per new program and at least \$18,750 per repeat (Exhibits A, B and C). Thus, for the 24 episodes in this season, Tandem received \$1,980,000 in new-program license fees plus \$450,000 in repeat-program license fees for a total of at least \$2,430,000.

10. Pursuant to ¶12 of the Tandem Agreement, an additional amount of \$16,000 was paid to Tandem on July 28, 1971 in consideration of its use of its best efforts to secure syndication and distribution rights in additional foreign areas (Exhibit A ¶12; P. Ex. 62 which is annexed as Exhibit G; Deposition of Sheldon Perry pp. 176-77, annexed hereto as Exhibit H).

11. Based upon the above calculations, the total of the license fees received by Tandem for the first two and one-half seasons of ALL IN THE FAMILY was at least \$6,041,500. But, this figure can only be considered a minimum because Tandem has apparently been successful in renegotiating the Tandem Agreement each year to increase the license fees beyond those shown in Exhibits A and B. Thus, the

Affidavit of Otis Pratt Pearsall

following is a report of statements made by John Schneider, President of the CBS Broadcast Group, to the FCC during hearings on the question of retention of the prime-time-access rule:

“ ‘Norman Lear’ the writing half of the Tandem Productions team of Bud Yorkin and Norman Lear that is producing the very successful *All in the Family* and *Maude* for CBS, ‘is a 2,000-pound gorilla,’ Mr. Schneider said. ‘And we can’t push Norman Lear around. We have firm contracts with him, and every year he comes in and tears them up. Each year his salary goes up 20 to 25%.’ ” (Exhibit I.)


WHEREFORE, plaintiffs respectfully request that their motion be in all respects granted.

Otis Pratt Pearsall

(Sworn to September 7, 1973.)

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**Exhibit A Annexed to Affidavit of Otis Pratt Pearsall
Memorandum of Agreement Dated as of July 10, 1970
Between CBS and Tandem**

(See Opposite )

MEMORANDUM OF AGREEMENT dated as of July 10, 1970 by and between CBS Television Network, a division of Columbia Broadcasting System, Inc., 51 West 52nd Street, New York, New York (hereinafter called "CBS") and Ten Productions, Inc., 1901 Avenue of the Stars, Suite 670, Los Angeles, California 90067 (hereinafter called "Contractor").

- 1) Contractor shall produce and furnish for broadcast over the television facilities of the CBS Television Network a series of one half-hour programs which shall be produced in color, on video tape, entitled ALL IN THE FAMILY. The series essentially will be a topical satire in conformance with material furnished to CBS and it is understood that Contractor will only be approximately two to three weeks ahead of air in order to keep the series topical. Each program will be produced to conform to a program format mutually approved between the parties.
- 2) CBS shall have the right to commence the broadcast of the series in mid-season of the 1970-71 season (in which event CBS must so advise Contractor on or before November 15, 1970) or the fall of 1971.
- 3) The series term shall be 5½ years (in the event the broadcast of the series is commenced mid-season 1970-71) or five years (in the event the broadcast of the series is commenced in the fall of 1971). CBS shall have the right to terminate this agreement effective at the end of any then current broadcast season by written notice to Contractor on or before April 1 of the then current broadcast season. If CBS does not exercise its right of termination, CBS shall have its customary first negotiation rights with respect to continuation of the series and, if the parties fail to reach agreement, first refusal rights for one year thereafter in connection with any third party offers which are equal to or less favorable to Contractor than Contractor's last offer to CBS.
- 4) The programs shall be delivered at the following license fees:

	<u>Per New Program</u>	<u>Per Repeat</u>
Mid-season 1970-71 (if applicable)	\$72,500	\$18,000
1st year (1971-72)	72,500	18,000
2nd year (1972-73)	75,000	18,750
3rd year (1973-74)	77,500	19,500
4th year (1974-75)	80,000	20,250
5th year (1975-76)	82,500	21,000

CBS had advanced the sum of \$109,902.97 against first year license fees and CBS has recouped said advance.

Contractor shall also be entitled to a non-recoupable pre-production fund of up to \$12,000 for accountable and substantiated pre-production expenses.

The above license fees are subject to the customary union, governmental and industry wide increases or decreases effective from and after July 10, 1970.

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5) The applicable prices per new program shall be payable as follows:
two-thirds upon completion of taping and one-third upon delivery.
The applicable repeat fee will be payable within ten days after
broadcast of the repeat.

6) Commitment:

(i) Mid-season 1970-71 start:

13 new programs; CBS shall have the right to increase its order
for new programs on a week to week basis but in no event more
than 17 additional new programs.

(ii) Fall 1971-72 start:

13 new programs; CBS shall have the right to increase its order
for new programs on a week to week basis but in no event more
than 17 additional new programs.

(iii) Notwithstanding subdivision (iv) below, in the event CBS commences
broadcasting mid-season 1970-71 and does not exercise its right
to terminate effective at the end of the 1970-71 season, CBS' mini-
mum commitment for the 1971-72 season will be 13 new programs and
CBS shall have the right to increase its order for new programs
on a week to week basis but in no event more than 17 additional
new programs provided that an aggregate of 22 new programs must be
ordered or the termination right exercisable on or before April
1, 1972 will be deemed to have been exercised.

(iv) Subsequent years:

16 new programs; CBS shall have the right to increase its order
for new programs on a week to week basis, but in no event more
than 14 additional new programs provided that an aggregate of 22
new programs must be ordered or the termination right exercisable
on or before the April 1 of the then current broadcast season will
be deemed to have been exercised.

(v) During each Broadcast season for which CBS orders new programs, CBS
shall have the right to broadcast repeat programs on an as needed
basis.

(vi) Notification for the ordering of any additional new program(s) beyond
the order of the minimum commitment must be given at least three weeks
prior to its scheduled telecast date.

7) The site for production of the series programs shall be California.

8) CBS shall have full prior approvals with respect to all key creative elements
and of such cast members, if any, who are featured in at least seven programs
in the average out of every 13 new programs produced. CBS shall have the

further right to approve of any substitute of any person or element approved by CBS. Jean Stapleton and Carroll O'Connor as leads, Sally Struthers and Bob Reiner as "Gloria" and "Mike", Michael Evans as "Lionel", and John Rich as Director have been approved, and the services of Stapleton, O'Connor, Struthers, and Reiner in each program hereunder are of the essence of this agreement.

- 9) Contractor warrants and represents that it has the agreement of Norman Lear that Norman Lear will produce and be the headwriter of the series on the following basis:

- (i) if the series is commenced for a mid-season 1970-71 start, all new programs produced for the 1970-71 season and if the termination right exercisable on or before April 1, 1971 is not exercised for a minimum of the first 13 new programs for the 1971-72 season.
- (ii) if the series is commenced for a fall 1971-72 start, for all new programs produced for the 1971-72 season.

After the applicable requirements set forth hereinabove in this paragraph have been satisfied, Norman Lear, at his sole election, may choose to render services as only Executive Producer of the series, it being understood that CBS' creative approval rights as set forth in Paragraph 8 shall be applicable with respect to any person thereafter rendering services as producer and/or stager and/or headwriter. It is understood that the services of Norman Lear as set forth hereinabove are of the essence of this agreement.

- 10) CBS shall reimburse Contractor for the cost (including*fringes and employer contributions and taxes) of the "black family" for each program in which any or all of such "black family" appears, it being understood that:

- (a) CBS shall have prior approval of the business arrangement for each member of the "black family",
- (b) No member of the "black family" other than Lionel shall appear in more than 13 episodes in any broadcast season.

- 11) The broadcast area shall be the United States, its territories and possessions (including Puerto Rico) Bermuda and Antigua. The broadcast area may be extended to include Canada (pre-release or otherwise) to accommodate a sale by CBS to an advertiser(s). With respect to broadcasts of the programs in Canada pursuant to the previous sentence, Contractor shall receive 60% and CBS shall receive 40% of the net-profits from such Canadian broadcasts without deduction of any distribution fee, but minus actual out-of-pocket costs.

*actual out-of-pocket

**program

- 12) Contractor shall have all merchandising rights at 5% merchandising fee. CBS shall be entitled to receive 15% of net profits from merchandising after the deduction of the aforesaid merchandising fee which includes standard costs and expenses of merchandising. CBS shall have all syndication and distribution rights to the programs, to the extent that Contractor shall secure the same, at CBS' standard distribution fees (40% foreign, 40% domestic station-by-station, 25% domestic regional, 10% domestic network) and CBS shall pay Contractor all net profits derived therefrom after deduction of said distribution fees and all distribution expenses. Contractor warrants and represents that as of this date, it has secured syndication and distribution rights in the United States, its territories and possessions (including Puerto Rico), Bermuda, Antigua, Canada, Great Britain and West Germany, on free television (including cable television not constituting "pay-TV"). Contractor will use its best efforts to secure additional syndication and distribution areas and CBS will reimburse Contractor for its expenses in securing same, up to a maximum of \$15,000. Contractor will constantly advise CBS of its progress in securing any such additional area(s).
- 13) CBS shall have its customary first negotiation/first refusal rights with respect to any spin-off from and stripping of this series.
- 14) The parties have negotiated the terms and conditions for Contractor's use of CBS' California below-the-line facilities in connection with the production of the series. The below-the-line facilities rates to be charged for each year, priced at CBS' standard rates are set forth in Exhibit A attached hereto, and to that extent, the below-the-line elements ordered by Contractor at the applicable rates are included in the package price for new programs specified in Paragraph 4 hereof. It is understood that Contractor shall be "protected" with respect to such below-the-line rates for the life of this agreement. (It is understood that CBS shall accept as an allowable below-the-line charge the sum of \$500 against rent, offices, etc.). In the event that the average below-the-line charges for the applicable contract year exceed the amount of \$22,500 multiplied by the number of new programs produced during such contract year, CBS agrees to absorb such excess up to an average of \$7,500 per program so produced. Any excess above the amount specified above shall be borne by Contractor with no right of reimbursement or recoupment whatsoever. The parties intend to enter into a formal agreement for the use of such facilities.
- 15) Any cost of re-editing new programs for purposes of repeating the same hereunder shall be borne by Contractor.
- 16) As used herein, "network broadcast" means a broadcast, transmission and/or exhibition by means of simultaneously interconnected television devices, methods and improvements, now or hereafter known, without limitation; a network broadcast includes delayed broadcasts made not later than 60 days after such simultaneous broadcast, transmission and/or exhibition over any facilities that shall not have been used therefor, although ordered therefor or normally used in connection with similar broadcasts, transmissions, and/or exhibitions; the television devices, methods and improvements referred to herein include, but are not limited to, so-called "booster" and "translator" stations and relay systems, as well as antenna systems which

receive and retransmit or redistribute (with or without amplification), television signals by wire or cable connection or otherwise to television receiving sets.

17) Contractor shall use reasonable efforts to secure from major performing talent that they will be available to perform lead-ins and lead-outs to commercials and commercials themselves during production periods for network sponsors at no additional expenses to CBS or the sponsor(s).

18) (a) The ALL IN THE FAMILY (as distinguished from TILL DEATH DO US PART) property, the series, the programs and all elements thereof shall be exclusive to CBS in television, radio and feature films from the date hereof until the expiration of the term of this Agreement within the broadcast area. The program series TILL DEATH DO US PART will not be exhibited on television in the broadcast area during the term hereof. For the purpose hereinabove set forth, Canada shall be deemed to be part of the broadcast area.

(b) Notwithstanding anything to the contrary set forth herein, it is understood and agreed that Norman Lear, the writers and John Rich and minor performing talent are not exclusive to the series. Further, the featured cast members will each be allowed to make three guest appearances during each 13 week cycle subject to granting time period and major sponsor protection.

19) (a) The parties hereto recognize that the concept of the program series represents an attempt at a new departure in conventional American television entertainment in that the comic premise of the program series is the satirization of political attitudes. Each program, however, shall comply with all CBS Program Practices policies and standards and CBS may require Contractor to make such changes in the script for any program or any material contained in any program or to edit any completed program as may be necessary to secure compliance with such policies and standards.

(b) In furtherance of CBS' rights pursuant to subparagraph (a) of this paragraph 19 and in order to fulfill the purpose of the program series as set forth in said subparagraph (a), Contractor warrants that neither the series nor any program therein shall become or be what would be considered the television equivalent of a tract on behalf of any political ideology or viewpoint, and that the range of political attitudes satirized in the program series shall be sufficiently varied so that the series does not become identified with any particular ideology or viewpoint.

CBS hereby acknowledges that it took delivery of the first thirteen programs in the series as acceptable for broadcast and that CBS will not hereafter claim that Contractor was in breach of its obligations in respect to those programs; provided, however, that CBS reserves the rights, should the need arise in CBS' opinion, to require Contractor to correct any imbalance in or respecting any one or more of those

programs in connection with their future use, the same to be done at CBS' expense; and provided further that CBS retains the right to require Contractor to correct any overall imbalance in those first thirteen programs by appropriate adjustments in program material in subsequent programs in the series.

- 20) CBS may assign its rights hereunder in full or in part to any person, firm or corporation provided, however, that no such assignment shall relieve CBS of its obligations hereunder.
- 21) The parties intend that mutually agreeable provisions customary in agreements of this nature, including, but not limited to, those covering additional warranties, indemnities, name and likeness, pay-or-play, morals, insurance, force majeure and breach, shall be applicable to this Memorandum of Agreement. The details of such provisions shall, together with the provisions hereof, be incorporated into a more formal agreement which, when executed, shall replace this Memorandum of Agreement. In addition, CBS' standard contract provision in respect of package supplier's compliance with Section 508 of the Federal Communications Act shall be applicable to this Memorandum of Agreement and shall be incorporated in the said more formal agreement.

CBS TELEVISION NETWORK
A division of Columbia
Broadcasting System, Inc.

for Gerald Rubin

ACCEPTED AND AGREED:

TANDEM PRODUCTIONS, INC.

By *Heinrich*

EXHIBIT A TO MEMORANDUM OF AGREEMENT DATED AS OF JULY 10, 1970
BETWEEN TANDEM PRODUCTIONS, INC. AND CBS TELEVISION NETWORK

Below-the-line facilities rates

<u>TECHNICAL SERVICES</u>	<u>UNIT</u>	<u>RATE</u>
Telecine Projector	Hour	\$100.00
VT Playback/Record/Edit	Hour	85.00
Inhouse Camera*	Day	300.00
Four Track Audio*	Hour	30.00
Orchestra Pre-Record/Balance*	Hour	25.00
Video Tape Stock Sold	Hour	255.00
Video Tape Stock Returned	Hour	200.00 cr.
Technician	Hour	17.00
Sound Effects Man	Hour	20.00
<u>FILM SERVICES</u>		
Projection Room	Hour	15.00
Film Editor	Hour	15.00
<u>STUDIOS AND SHOPS</u>		
Studio Operation	Hour	250.00
Studio Set/Strike	Hour	125.00
Control Room	Hour	30.00
Rehearsal Hall	Hour	20.00
Stagehand	Hour	8.00
Electric Shop Man	Hour	12.00
Make-Up/Hairdresser	Hour	11.00
Stage Manager	Hour	12.00
Lighting Director	Hour	15.00
Carpenter	Hour	11.00
Scenic Artist	Hour	11.00
Wardrobe Handler	Hour	9.00
Set Decorator	Hour	11.00
Special Effects Man	Hour	12.00
Graphic Artist	Hour	14.00
Draper	Hour	11.00
Prop Handler	Hour	8.00

*Rate does not include manpower.

. As of July 10, 1970

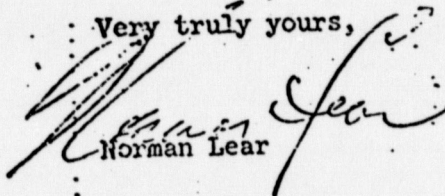
CBS Television Network
A division of Columbia
Broadcasting System, Inc.
51 West 52nd Street
New York, New York 10019

Gentlemen:

You have entered into an agreement dated July 10, 1970 with Tandem Productions, Inc. (Contractor) pursuant to which Contractor agreed to furnish to you my services in a program series presently entitled **ALL IN THE FAMILY**.

In consideration of your entering into said Agreement, I acknowledge that I have carefully examined said Agreement. I agree that insofar as the same provides for the performance of services by me and the imposition of duties and obligations upon me, I will faithfully perform all of the same to the best of my ability and to the same extent as though I had entered into an agreement directly with you, in which I agreed to perform such services, and assumed such obligations and duties. I acknowledge that you would not have entered into the Agreement but for the execution of this agreement by me.


Very truly yours,


Norman Lear

15b - 152a

Exhibit B Annexed to Affidavit of Otis Pratt Pearsall

**Letter Agreement Dated July 21, 1971
Between CBS and Tandem**

(See Opposite )

CBS TELEVISION NETWORK

A Division of Columbia Broadcasting System, Inc.
Television City
7620 Beverly Boulevard
Los Angeles, California 90036
(213) OLIVE 1-2345

66
Exh. For ID
Pff. Exh. 1-3
Waller Shapiro
Doyle Report
7-13-73

July 21, 1971

Tandem Productions, Inc.
1901 Avenue of the Stars
Suite 670
Los Angeles, California 90067

RE: ALL IN THE FAMILY

Gentlemen:

Reference is made to the Memorandum of Agreement between us dated as of July 10, 1970.

Said Memorandum of Agreement is hereby amended as follows:

- 1) Paragraph 4 - As a result of CBS' agreement to include the \$7,500 override in the license fee for new programs effective with the 1971-72 season, the new program prices shall be as follows:

"1st year (1971-72).....	\$80,000
2nd year (1972-73).....	82,500
3rd year (1973-74).....	85,000
4th year (1974-75).....	87,500
5th year (1975-76).....	90,000

In addition to the foregoing, CBS shall pay Contractor an additional sum of \$750 per new program produced for the 1971-72 season."

- 2) Paragraph 14 - Effective with the 1971-72 season, Contractor shall pay actual below-the-line costs on a weekly basis with no \$7,500 override protection inasmuch as the override has been added to the license fee.

Except as modified above, all other terms and conditions of said July 10, 1970 Memorandum of Agreement shall remain in full force and effect and are hereby ratified and confirmed.

Will you please sign in the space provided for below to conform your acceptance hereof.

Very truly yours,

CBS TELEVISION NETWORK
a division of Columbia
Broadcasting System, Inc.

By Gerald Rul


ACCEPTED AND AGREED:

Tandem Productions, Inc.

By [Signature]

153a - 154a

**Exhibit C Annexed to Affidavit of Otis Pratt Pearsall
Deposition of Norman M. Lear (Excerpts)**

(See Opposite )

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

VIACOM INTERNATIONAL, INC., et
al.,

Plaintiffs,

vs.

TANDEM PRODUCTIONS, INC.,

Defendant,

and

COLUMBIA BROADCASTING SYSTEM,
INC.,

Additional Party Joined
Pursuant to Rule 19.

No. 73 Civ. 2941 (M.I.G.)

Deposition of NORMAN M. LEAR, taken on
behalf of the Plaintiffs, at 450 North
Roxbury Drive, Beverly Hills, California,
commencing at 9:30 A.M., Monday, August
20, 1973, before Harold M. Leibovitz and
Ben Hyatt, Certified Shorthand Reporters
and Notaries Public, pursuant to Notice.

- - - - -

NOON & PRATT
Certified Shorthand Reporters
1930 WILSHIRE BLVD., SUITE 400
LOS ANGELES, CALIF. 90057
PHONE: 484-9770

1 MR. PEARSALL: That is not what I am trying to get at here,
2 Mr. Shelton. I am trying to refresh the witness' recollection.

3 Q That is what I have reference to as the production
4 advances. What I had reference to as the preproduction nonrecoup-
5 able payment is what they are talking about in the next paragraph
6 there, which is the \$12,000. Do you see that?

7 A \$12,000 for accountable and substantiated preproduction
8 expenses.

9 Q What I am asking you is whether you recall that not
10 only did CBS in the fall of 1970 make production advances which
11 were recoupable, but in addition they made payments of \$12,000
12 to Tandem of the preproduction expenses on a nonrecoupable basis.

13 A I have the vaguest memory of this \$12,000 figure and
14 nothing more. If you are asking me do I remember receiving the
15 check or how it occurred, I have no memory of it at all.

16 Q Thereafter as the program went on the air each
17 successive week commencing in January of 1971 CBS made payment,
18 did it not, to Tandem of the license fees prescribed in that
19 Exhibit 65 that we are looking at?

20 A It made payment to Tandem through EBM of the license
21 fees. I never saw a check or knew when they were paid.

22 Q The program, as you have already indicated, initially
23 went on the air in January of 1970 and it proceeded to go --

24 MR. SHELTON: That's not correct.

25 MR. PEARSALL: Q -- '71, and it proceeded to run on a
26 weekly basis, did it not?

27 A Yes.

28 Q For 13 episodes; is that correct?

1 A Yes, that's correct.

2 Q And then it immediately recommenced running with
3 13 repeats; isn't that so?

4 A That's correct.

5 Q During the fall of 1970 as you were going forward with
6 your production efforts that you have described, was CBS going
7 forward, to your knowledge, with any of its own activities to
8 pave the way for the airing of "All In The Family"?

9 A Is the word "fuck" allowed in this deposition? They
10 weren't doing a fuckin' thing.

11 Q Did they go forward with the sale of advertising time
12 to advertisers, do you know? Did you get any reports on that?

13 A I didn't get any reports on it, but when the show went
14 on the air there were advertisers. When I said they weren't doing
15 anything, I had reference to the fact that they were concerned
16 with how the public would take it, so they did not advertise it,
17 they did not promote it on the air. To the best of my recollection
18 there were no on-the-air promotions, no advertising. It simply
19 went on and with the disclaimer that I referred to earlier.

20 Q But they were obviously out selling time in the
21 program, because, in fact, time was sold for "All In The Family";
22 isn't that correct?


23 A Yes. And it was their business to do that.

24 Q In fact, you complained, did you not, to CBS about
25 their failure to do what you thought was appropriate in terms of
26 promotion and advertising and you asked for more promotion and
27 advertising, didn't you?

28 A I did.

155a - 156a

**Exhibit D Annexed to Affidavit of Otis Pratt Pearsall
Letter, December 10, 1970, Perry to Hayes**

(See Opposite )

CBS TELEVISION NETWORK

A Division of Columbia Broadcasting System, Inc.
51 West 52 Street
New York, New York 10019
(212) 755-4321

RE: ALL IN THE FAMILY (also Wally's Castle)

Dear Bill:

Enclosed herewith is our check in the amount of \$21,312.55 (pursuant to your November 27 invoices of \$21,112.64 and \$1,991.91). The aforesaid \$21,312.55 will be treated as an additional production advance against license fees which, with this check, will total \$109,902.97. Accordingly, pursuant to our agreed upon formula, we will recoup against the first ten (10) shows at the rate of \$10,990.30.

As discussed, from here on in, the West Coast will handle series billing. I wish to extend my best wishes for a most successful program series.

Best personal regards.

Sincerely,

Cheldon Perry
Associate Director
Business Affairs

Mr. J. William Hayes
Executive Business Management
132 South Rodeo Drive
Beverly Hills, California

December 10, 1970


cc: Sam Cohn, Esq.

Del. Exh. For ID 112
Pll. Exh. In EV
Waller Shapiro CSR
Doyle Reporting Inc.

7-19-73

157a- 158a

**Exhibit E Annexed to Affidavit of Otis Pratt Pearsall
Deposition of James William Hayes (Excerpts)**

(See Opposite )

C O P Y

NOON & PRATT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

VIACOM INTERNATIONAL, INC., et
al.,

Plaintiffs,

vs.

TANDEM PRODUCTIONS, INC.,

Defendant,

and

COLUMBIA BROADCASTING SYSTEM,
INC.,

Additional Party Joined
Pursuant to Rule 19.

No. 73 Civ. 2941 (M.I.G.)

Deposition of JAMES WILLIAM HAYES, taken on
behalf of the Plaintiffs, at 450 North
Roxbury Drive, Beverly Hills, California,
commencing at 4:10 P.M., Wednesday, August
22, 1973, before Harold M. Leibovitz and
Ben Hyatt, Certified Shorthand Reporters
and Notaries Public, pursuant to Notice.

AND PROCEEDINGS OF

THURSDAY,

AUGUST 23, 1973

NOON & PRATT
Certified Shorthand Reporters
1930 WILSHIRE BLVD., SUITE 400
LOS ANGELES, CALIF. 90057
PHONE: 484-9770

1 inadequate, he was having trouble -- just kind of general, "I am
2 having trouble making ends meet," and he wanted a black family
3 and subsequent thereto CBS made an allocation for the black family.

4 MR. PEARSALL: Mr. Shelton, may we have production of the
5 January 1971 letter from Lear to Sipes?

6 MR. SHELTON: I don't have it.

7 MR. PEARSALL: Q Do you have a copy of it in your office?

8 A I remember it distinctly, and I will see if I can
9 find it for you.

10 Q I show you two documents that have been marked
11 Plaintiffs' Exhibits 84 and 87 for identification and ask whether
12 or not you received copies of those documents.

13 A Yes.

14 Q I show you a copy of Plaintiffs' Exhibit 2 for
15 identification, which is a couple of pages from Variety, Weekly
16 Variety, of July 22, 1970, and ask you whether or not you read
17 that article concerning "All In The Family" at the time it came
18 out.

19 A No, I don't think I did. It must have been in Weekly
20 Variety.

21 Q It was.

22 A I don't subscribe to that.

23 Q I show you a copy of Plaintiffs' Exhibit 18 for
24 identification and ask whether or not you received that document?

25 A Yes, I did.

26 Q On the first page there is reference to the enclosure
27 of a check for \$8,969.11. Do you recall receiving that check?

28 A I personally wouldn't have received it in the mail. I

1 am reasonably sure it was received, of course. But to answer
2 your question, I don't handle the checks in the office.

3 Q I show you Plaintiffs' Exhibit 103 for identification
4 and ask whether that is a copy of a letter which you received
5 from Mr. Perry.

6 A Yes.

7 Q I show you Plaintiffs' Exhibit 113 and ask if that
8 is a copy of a letter that you received from Mr. Perry?

9 A Yes.

10 Q I show you a copy of a document that has been marked
11 Plaintiffs' Exhibit 112 for identification and ask if that is a
12 letter you received from Mr. Perry?

13 A Yes.

14 Q Mr. Hayes, I show you a copy of a document which has
15 been marked Plaintiffs' Exhibit 12 for identification, together
16 with its enclosure, and ask whether or not you received a copy
17 of that letter together with this enclosure from Mr. Perry.

18 A Yes.

19 Q Now, is that the form of memorandum of agreement
20 that you had reference to a little earlier in your discussion as
21 having been received and then you got off a commentary to Mr.
22 Perry raising points addressed to that memorandum?

23 A To the best of my recollection, the answer is "Yes."

24 Q I show you Plaintiffs' Exhibit 14 for identification
25 and ask whether or not that is a copy of a document you received
26 from Mr. Perry.


27 A Yes.

28 Q I show you Plaintiffs' Exhibit 16 for identification,

159a-160a

Exhibit F Annexed to Affidavit of Otis Pratt Pearsall

**Letter, October 20, 1970, Perry to Hayes;
Letter, November 13, 1970, Perry to Hayes;
and Letter December 10, 1970, Perry to Hayes**

(See Opposite )

CBS TELEVISION NETWORK

A Division of Columbia Broadcasting System, Inc.
51 West 52 Street
New York, New York 10019
(212) 765-4321

Def. Exh. For ID 18
Pl. Exh. In-Ex
Walter Shapiro CSR
Doyle Reporting Inc.
7-13-73

RE: WALLY'S CASTLE (also known as ALL IN THE FAMILY)

Dear Bill:

As you well know, I have been the recipient of many bills, letters and various other paper missiles originating from your office which I promised I would look into expeditiously. I am now at the point where I have answers and accordingly, the following is in reply to the documents set forth below:

- 1) Your letter dated August 12, 1970 to Ann Nelson
billing pre-production charges of..... \$6,182.52
(for period ending 7/31/70)

Your letter dated August 28, 1970 to Ann Nelson
billing pre-production charges of..... 2,563.48
(for period ending 8/31/70)

Your letter to me dated October 6, 1970 bill-
ing pre-production charges of..... 1,809.87
(for period ending 9/30/70)

Total \$10,555.87

This will acknowledge receipt of your September 30, 1970 letter which attached a copy of Bud Yorkin's letter to you dated September 21, 1970 explaining and substantiating the various charges set forth in the above bills. Accordingly, we can accept all of the charges set forth in such bills except the \$1,000 charge for Greg Zittel which in our opinion should be charged as a production expense and the charge of \$586.76 with respect to your trip to New York at the time of negotiation of the deal. Accordingly, enclosed is our check in the amount of \$8,969.11 in reimbursement for such pre-production expenses leaving a balance of \$3,030.89 in the pre-production fund.

- 2) Your letter dated October 8, 1970 to me billing production expenses of \$38,590.42 - Enclosed herewith is our check in said amount of \$38,590.42 which, pursuant to Don Sipes' agreement with you, will be treated as an additional production advance against license fees. Please note the suggested recoupment formula outlined in point 3(c).

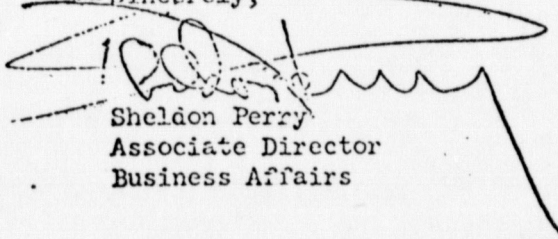
MR. HAYES

- 3) Your letter dated October 6, 1970 to me with respect to the proposed Memorandum of Agreement dated July 10, 1970 between Tandem Productions, Inc. and CBS (utilizing the Memorandum of Terms paragraph references):
- (a) Paragraph 1 - The essence of what is stated therein is in accordance with our understanding.
 - (b) Paragraph 2 - This will confirm our firm program commitment. Any such commitment is, of course, subject to pay or play and you do not have a firm "on the air" commitment from CBS.
 - (c) Paragraph 4 - As set forth above in point 2), we have now advanced an additional \$38,590.42 for a total advance against license fees of \$88,590.42. Pursuant to your recommended method of recoupment, as updated by today's telephone conversation, we will recoup against the first ten shows at the rate of \$8,859.04.
 - (d) Paragraph 7 - We accept your comments as set forth herein.
 - (e) Paragraphs 9 and 18 - The terms of Paragraph 18 are subject to the terms of Paragraph 9.
- 4) Your letter dated October 13, 1970 to me enclosing a copy of Jerry McPnie's letter to you dated October 8, 1970 - The essence of Jerry McPnie's letter dated October 13, 1970 is correct.

I wish to thank you for your patience in all of the foregoing matters and I trust that all outstanding problems are now resolved.

Best personal regards.

Sincerely,



Sheldon Perry
Associate Director
Business Affairs

Mr. J. William Hayes
Executive Business Management
132 South Rodeo Drive
Beverly Hills, California

October 20, 1970

cc: Mr. Sam Cohn

bc: Messrs. Agoglia, Daly, McGowan, Rubin, Sipes, Lyons,
Miss Ann Nelson

CBS TELEVISION NETWORK

A Division of Columbia Broadcasting System, Inc.
51 West 122 Street
New York, New York 10019
(212) 765-4321

RE: ALL IN THE FAMILY (Also Mally's Castle)

Dear Bill:

Enclosed herewith is our check in the amount of \$1,751.89 made payable to Tandem Productions, Inc. in reimbursement for substantiated pre-production expenses in connection with the above-captioned program series.

Sincerely,

Sheldon Perry
Associate Director
Business Affairs

Mr. J. William Hayes
Executive Business Management
132 South Redco Drive
Beverly Hills, California

November 13, 1970

BP/jb
Encl.

cc: Mr. Sam Cohn

Det. Exh. For ID 103
PII. Exh. 4a-EX
Waller Shapiro CSR
Doyle Reporting Inc.

7-19-73

CBS TELEVISION NETWORK

A Division of Columbia Broadcasting System, Inc.
51 West 52 Street
New York, New York 10019
(212) 765-4321

RE: ALL IN THE FAMILY (Also Wally's Castle)

Dear Bill:

Enclosed herewith is our check in the amount of \$1,277.00 made payable to Tandem Productions, Inc. in reimbursement for substantiated pre-production expenses in connection with the above-captioned program series.

Sincerely,

Sheldon Perry
Associate Director
Business Affairs

Mr. J. William Hayes
Executive Business Management
132 South Rodeo Drive
Beverly Hills, California

SP/jb
Encl.

December 10, 1970

cc: Sam Cohn, Esq.


REGISTERED MAIL
RETURN RECEIPT REQUESTED

Deliv. Exh. For ID 113
PII. Exh. ~~JA-EV~~
Walter Shapiro CSR
Doyle Reporting Inc.

7-19-73

161a - 162a

Exhibit G Annexed to Affidavit of Otis Pratt Pearsall
Letter, July 28, 1971, Nelson to Hayes

(See Opposite )

CBS TELEVISION NETWORK

A Division of Columbia Broadcasting System, Inc.
Television City
7600 Beverly Boulevard
Los Angeles, California 90035
(213) OLIVE 1-2345

Deft. Exh. For ID 62
Plf. Exh. In-Ex
Walter Shapiro CSR
Doyle Reporting Inc.

7-13-73

July 28, 1971

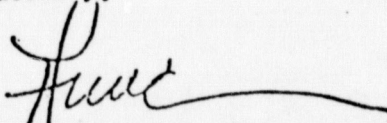
Dear Bill:

Enclosed is a CBS check dated July 22, 1971, in the amount of \$16,000, which is the payment agreed to under paragraph #12 of the memo of agreement between CBS and TAIDEM PRODUCTIONS in connection with "All In The Family".

We are hopeful that the revised pages will be out to all of you before the end of the week and that you will find them in order for signature.

Kindest regards.

Sincerely,



Anne Nelson
Business Affairs

Mr. Bill Haysen
Executive Business Management
132 South Rodeo Drive
Beverly Hills, California 90212


Enclosure

cc: Mr. Perlberger
Mr. Perry
Mr. Rubin

Shirley

163a 164a

**Exhibit H Annexed to Affidavit of Otis Pratt Pearsall
Deposition of Sheldon Perry (Excerpts)**

(See Opposite )

POS
DLT
CHEZ

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
VIACOM INTERNATIONAL, INC., :
et al., :
Plaintiffs, :
-against- :
TANDEM PRODUCTIONS, INC., :
Defendant. :
-----X

73 Civ. 2941
(M.I.G.)

Deposition of SHELDON PERRY, taken by
the Plaintiffs, pursuant to Notice to commence
at 9:30 a.m. on July 12, 1973 and subsequently
adjourned to 10:00 a.m. on that same day, and
to further adjournment until 10:00 a.m. on
Friday, July 13, 1973, at the offices of
Columbia Broadcasting System, Inc., Law
Department, 36th Floor, 51 West 52nd Street,
New York, New York, before Walter Shapiro,
Certified Shorthand Reporter and a Notary Public
within and for the State of New York.

DOYLE REPORTING, INC.
CERTIFIED STENOGRAPHIC REPORTERS
132 NASSAU STREET
NEW YORK, N. Y. 10038
TELEPHONE BARCLAY 7-6441

A p p e a r a n c e s :

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One Wall Street
New York, New York

By: OTIS PRATT PEARSALL, ESQ.
-and-
ALLAN J. KASEN, ESQ.,
of Counsel

CRAVATH, SWAINE & MOORE, ESQS.
Attorneys for Columbia Broadcasting System
One Chase Manhattan Plaza
New York, New York

By: JAMES F. GLEASON, JR., ESQ.
-and-
STEVEN EDWARDS, ESQ.,
of Counsel

RUBIN, WACHTEL, BAUM & LEVIN, ESQS.
Attorneys for Defendant
598 Madison Avenue
New York, New York

By: GERALD HARRIS, ESQ.
-and-
RONALD GREENBERG, ESQ.,
of Counsel

Also Present:

RONALD LIGHTSTONE

WILLARD BLOCK

JACOB MILKENS, ESQ.

* * *

1
2 reinstated in paragraph 12, that had been left out.

3 Q Can you tell us what that language is?

4 A Yes. The first two sentences of the new page
5 4, as distributed in the letter of July 16th, reinstates
6 the first two sentences of the first draft which we
7 have been referring to as the "Wally's Castle" draft,
8 originally distributed September 25, 1970, intact.

9 Q Otherwise paragraph 12 on the revised page
10 4, insofar as it relates to syndication and distribu-
11 tion rights, tracks the language of paragraph 12 as it
12 had been distributed in the second draft circulated with
13 the cover letter of June 16, 1971?

14 A That is correct.

15 Q Thank you.

16 A The third change, there was another change that
17 did not appear in the version presented to us here,
18 which was an inked-in change of the dollar amount, which
19 I don't think is significant.

20 Q Thank you.

21 I show you Plaintiffs' Exhibit 62 for
22 identification, and I ask whether or not you can identify
23 that document.

24 A Yes, I recall seeing a copy of that.

25 Q And this is the cover letter which Mrs.

Nelson sent to Mr. Hayes, ultimately paying Tandem that \$16,000 we have had repeated reference to, pursuant to paragraph 12 of the memorandum of agreement?

A That's correct.

Q I show you Plaintiffs' Exhibit 63 for identification, and ask whether or not you can identify that, which is a letter to Mr. Perlberger from Mr. Wing, dated July 29, 1971.

A Yes, I recall seeing this.

Q By this letter Mr. Wing forwarded to Mr. Perlberger for execution the memorandum of agreement dated as of July 10, 1970, and specifically the version showing the typing date of 7/22/71?

A That is correct.

Did you say, for clarification, "an agreement," only because there was an amendment here, as well?

Q Oh, yes, I did say "agreement" only, yes. Why don't you clarify it in your answer?

A There was an agreement and an amendment forwarded.


Q The amendment dated --

A July 21, 1971.

Q So the cover letter really covered the sending out of two documents for execution, the original memorandum of agreement dated as of July 10, 1970,

165a- 166a

Exhibit I Annexed to Affidavit of Otis Pratt Pearsall
Article in *Broadcasting*, August 6, 1973

(See Opposite )



Mr. Shestack



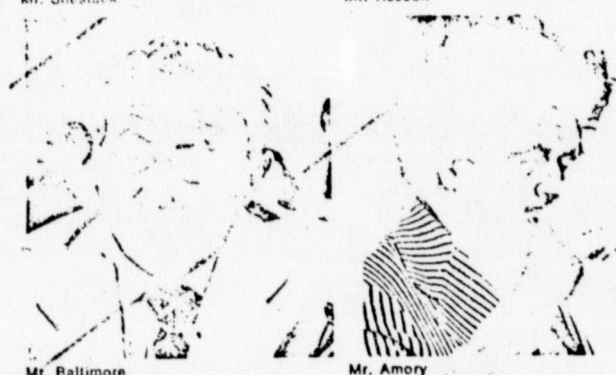
Mr. Russell



Mr. Bailey



Mr. Diamond



Mr. Baltimore

Mr. Amory

not often been made before: the networks have the "courage" to do off-beat and controversial-issue programming that stations might lack. Usually networks are accused of lack of courage.

The praise came from Mr. Yorkin, who with his partner, Norman Lear, have three successful comedies on the networks—*All in the Family* and *Maude* on CBS, and *Sanford and Son* on NBC—and Mr. Rich, executive producer of *The Waltons*, on CBS. Mr. Yorkin said the networks have made it possible for him and his partner to "make a strong move to help man understand his fellow man." And Mr. Rich said only a network would have the "courage" to do "a soft show," like *The Waltons*. Both said they were not dominated by the networks; that they used them only as the most efficient conduit available for their programming.

The commission has said its review could result in retention of the rule (perhaps with modifications to eliminate some of the problems that have developed in connection with it), in repeal, or in a compromise in the form of a major revision of the rule.

And the last possibility seemed the most likely after the oral argument, according to some commission sources. The staff has prepared a number of options for the commission's consideration: one that would be an almost classic compromise would return to the networks two or three of the half-hours now denied them (BROADCASTING, June 18).

The commission is expected to act by late September. And that schedule could have effect on the outcome of the proceeding. Commissioner Nicholas Johnson, who is believed to support the rule, will have probably left the commission by that time. He has been serving beyond the

June 30 expiration of his term because the President has yet to appoint a successor. But James H. Quello, the former Detroit broadcaster who is said to be the President's choice to replace Mr. Johnson (BROADCASTING, July 30), could be serving before the end of September.

The weight Lear swings at CBS

Nobody pushes Tandem Productions around, says Jack Schneider in response to a charge that CBS requires its producers to use the network's video-tape facilities

To John Schneider, president of the CBS/Broadcast Group, Norman Lear is a 2,000-pound gorilla. You know, the one in the joke that can sleep anywhere he darn pleases.

Mr. Schneider offered the estimate in the FCC's oral argument on the prime-time-access rule last week, when a question was raised as to whether Mr. Lear's Tandem Productions and other producers providing programming for CBS are obliged to use CBS's taping facilities.

It so happens that all producers for CBS using tape do use the network's facilities. (That is not true of shows done on film.) But, Mr. Schneider said, in response to Commissioner Nicholas Johnson's feigned amazement at the "coincidence," that condition comes about only because CBS's facilities are the "best" and are offered at competitive prices.

The question had been raised as a result of an allegation by Katrina Renouf, counsel for the National Association of Independent Television Producers, which favors retention of the rule, that inde-

And half a dozen otherwise. Jerome Shestack of Schnader, Harrison, Segal and Lewis, counsel to NBC, said that network no longer finds the rule offensive. Irwin Russell of the Wolper Organization said that if the rule is retained, it should exempt "educational value programming" or, if not, require the networks to provide one hour a week of such fare. Richard E. Bailey Sr., of the Hughes Sports Network, proposed that affiliates be required to pre-empt 5% of prime-time network programming each quarter. Marvin Diamond, counsel for Hughes, said that "Any rule that does not require pre-emption will permit networks to determine when the access period will be." David Baltimore, WBRE-TV Wilkes-Barre, Pa., an NBC-affiliated UHF, urged removal of the off-network-program restriction, and noted that he faces competition from cable systems that import shows he can't touch. Cleveland Amory, critic for *TV Guide*, said the rule hasn't worked but that it is essential that its intended goal be achieved.

pendent producers providing network programming are "locked into contracts that require use of network facilities."

"Norman Lear," the writing half of the Tandem Productions team of Bud Yorkin and Norman Lear that is producing the very successful *All in the Family* and *Maude* for CBS, "is a 2,000-pound gorilla," Mr. Schneider said. "We can't push Norman Lear around. We have firm contracts with him, and every year he comes in and tears them up. Each year his salary goes up 20 to 25%."

The counsel for NBC, Jerome Shestack, said it is not true that independent producers must use NBC facilities for producing their programs. ABC's counsel, James McKenna, was asked by the commission to provide information regarding that network's practices.

ABC picks up Riggs-King match for \$700,000

Network already has sold out game and will put it on in prime time

ABC-TV has bought the rights for a two-hour prime-time telecast of the Billie Jean King-Bobby Riggs tennis match. The event will be aired live from the Houston Astrodome on Thursday, Sept. 20, at 8 p.m. NYT, with the winner picking up \$100,000, the loser nothing.

The network paid an estimated \$700,000 for the rights, and the 15 commercial minutes were priced at \$90,000 per minute (although each of the nine sponsors was accorded at least a nominal discount on that figure, according to an

167a-168a

**Affidavit of Cornelius Sullivan Dated September 7,
1973, in Support of the Motion to Dismiss
the Fifth Defense**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New York)
County of New York) ss.:

CORNELIUS SULLIVAN, being duly sworn, deposes and
says:

1. I am the Director of Business Affairs of Viacom Enterprises, a division of Viacom International Inc. ("Viacom"), one of the plaintiffs herein.

2. As a result of Viacom's foreign syndication of *ALL IN THE FAMILY*, Viacom has already paid to Tandem Productions, Inc. ("Tandem") \$105,925.23. This sum represents Tandem's share of the payments which have been made to Viacom by foreign broadcasters through June 30, 1973, after deduction of Viacom's standard distribution fee and the direct distribution costs paid by Viacom.

3. Annexed hereto as Exhibit A is the latest accounting statement rendered by Viacom to Tandem on August 28, 1973. The sum of \$105,925.23 paid to Tandem is reflected on Exhibit A as follows. The column entitled "Total" summarizes the total gross receipts paid by foreign broadcasters to Viacom through June 30, 1973 (\$291,024.42), the deduction therefrom of Viacom's standard distribution fee

Affidavit of Cornelius Sullivan

at 40 percent (\$116,409.77) and the deduction of direct distribution costs paid by Viacom through June 30, 1973 (\$68,847.66). The column also reflects that prior to the quarter ending June 30, 1973, Tandem received as its share of receipts \$89,966.46 and that for the quarter ending June 30, 1973, Tandem received an additional payment of \$15,958.77, for total payments to Tandem of \$105,925.23.

4. Exhibit A is a document made in the regular course of Viacom's business, and it was the regular course of Viacom's business to prepare such a document in connection with Viacom's quarterly accountings to Tandem.


CORNELIUS SULLIVAN

(Sworn to September 7, 1973.)

170a

Exhibit A Annexed to Affidavit of Cornelius Sullivan

**Letter, August 28, 1973, from Sullivan to Nicol,
Together With Statement of Gross Receipts and
Costs from Inception Through June 30, 1973**

(See Opposite )

VIACOM ENTERPRISES
A DIVISION OF VIACOM INTERNATIONAL INC.
345 PARK AVENUE • NEW YORK, NEW YORK 10022 • (212) 371-5300

RECEIVED

AUG 29 1973

RONALD LIGHTSTONE

August 28, 1973

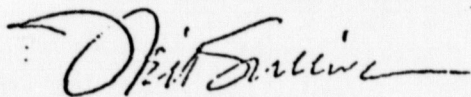
Mr. Keith Nicol
Vice President, Accounting
Executive Business Management, Inc.
EBM Building
132 S. Rodeo Drive
Beverly Hills, California 90212

Re: ALL IN THE FAMILY

Dear Keith:

I enclose our accounting for the period ending June 30, 1973 and the check of Viacom in the sum of \$15,958.77 payable to Tandem's order representing its further distributive share of receipts with respect to the above series.

Best personal regards,



Neil Sullivan
Director
Business Affairs

Enclosures: (2)

cc: Messrs. Almonte, Block, Gorman, Lightstone, B. Wilson, Zeiger;
Miss Mizwinski

EXHIBIT A

ALL IN THE FAMILY

Statement of Gross Receipts and Costs From Inception Through June 30, 1973

	<u>Total</u>	<u>Area I England</u>	<u>Area II Europe</u>	<u>Area IV Australasia</u>	<u>Area V Latino</u>	<u>Bermuda</u>	<u>Canada</u>
Gross Receipts	\$291,024.42	\$79,118.00	\$19,675.00	\$152,063.42	\$ -	\$320.00	\$39,848.00
Less:							
Distribution Fee @ 40%	116,409.77	31,647.20	7,870.00	60,825.37	-	128.00	15,939.20
Distribution Costs:							
Script, Screening & Editing	1,118.38	188.56	347.92	475.85	-	-	106.05
Advertising & Promotion	2,229.80	833.37	71.31	872.28	-	-	452.84
Prints, Reels & Cans	41,257.23	11,419.32	1,408.88	22,405.03	125.62	31.94	5,866.44
Video Tape	14,831.25	10,433.11	420.57	579.82	-	-	3,397.75
Storage & Handling	2,499.83	333.24	900.95	744.57	4.74	-	516.33
Shipping & Import Costs	3,916.51	922.80	521.24	847.43	14.11	2.54	1,603.39
Miscellaneous	2,994.66	1,526.26	99.35	869.64	1.77	5.24	492.40
TOTAL	185,257.43	57,303.86	11,640.22	87,619.99	146.24	167.72	23,379.40
Gain or (Loss) From Dist.	105,766.99	21,814.14	8,034.78	64,443.43	(146.24)	152.28	11,468.60
Less: Residual Advances							
Talents	9,532.97	3,460.67	2,200.05	3,872.25			
Writers/Directors	37,303.00	3,800.30	7,919.68	25,583.02			
Prior Payments	43,130.49	14,742.86	(1,348.95)	18,103.70	-	152.28	11,480.60
Total Advances & Prior Payments	89,966.46	22,003.83	8,770.78	47,558.97	-	152.28	11,480.60
Gain or (Loss) by Area	15,800.53	\$ (189.69)	\$ (736.00)	\$16,884.46	\$(146.24)	\$ -	\$ (12.00)
Add Area V & Canadian Loss	158.24						
Amount Due Producer	\$15,958.77						

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**Plaintiffs' Objection to Offer of Proof Submitted by
Defendant in Support of Its Fifth Defense**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

73 Civ. 2941 (M.I.G.)

VIACOM INTERNATIONAL INC., *et al.*,

Plaintiffs,

against

TANDEM PRODUCTIONS, INC.,

Defendant.

SIRS:

PLEASE TAKE NOTICE that plaintiffs object to the introduction into evidence in this action of the alleged facts in support of the Fifth Defense described in defendant's "Offer of Proof" dated September 25, 1973 on the grounds that the Fifth Defense is insufficient and should be dismissed for the reasons set forth in plaintiffs' pending motion pursuant to Fed. R. Civ. P. 12(c), 12(f), 12(h)2 and 56. Accordingly the proof thus offered by defendant is irrelevant.

Dated: New York, New York
September 28, 1973

Yours, etc.,

HUGHES HUBBARD & REED
Attorneys for Plaintiffs
One Wall Street
New York, New York 10005
212 WH 3-6500

To:

SHEA, GOULD, CLIMENKO & KRAMER
Attorneys for Defendant
Tandem Productions, Inc.
330 Madison Avenue
New York, New York 10017

**Stipulation re: Admissibility of Documents
Court's Exhibit 1**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

73 Civ. 2941 (M.I.G.)

VIACOM INTERNATIONAL INC., *et al.*,

Plaintiffs,

against

TANDEM PRODUCTIONS, INC., and
COLUMBIA BROADCASTING SYSTEM, INC.,

Defendants.

IT IS HEREBY STIPULATED AND AGREED by and between the undersigned attorneys for the respective parties that the following stipulations shall apply at the trial of this action:

1. Copies of documents shall be admissible into evidence in lieu of original documents.
2. Any document which comes from the file of any party to this action and which appears to be authentic shall be admissible into evidence without the need of an identifying witness and no party will object to the admissibility of any such document on the ground of authenticity.
3. Any document which appears to be authentic and which was prepared by Viacom (including any of its subsidiaries which are plaintiffs herein), CBS, CBS Enterprises, Tandem, Executive Business Management of Creative Management Associates, shall be deemed to satisfy the business record rule.
4. The principal place of business and the state of incorporation of each party to this action is the principal place of business and state of incorporation of each such party as alleged in paragraphs 1 through 8, 10 and 11 of the Second Amended Complaint.

Stipulation

5. The schedule prepared by plaintiffs entitled "ALL IN THE FAMILY—RATINGS, National Nielsen TV Ratings" shall be admissible, subject to objections as to relevance or materiality, into evidence and plaintiffs will not be required to introduce into evidence the Nielsen reports which underly the information contained in said schedule. Upon request, plaintiffs will provide the Nielsen reports to the attorneys for Tandem and CBS for their inspection.

6. Columbia Broadcasting System, Inc., in the name of Tandem Productions, Inc., has secured and duly registered under the United States Copyright Act, 17 U.S.C. §§1 *et seq.*, a federal copyright for each episode of ALL IN THE FAMILY.

Dated: New York, New York
September 14, 1973

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SHEA GOULD CLIMENKO & KRAMER

By Joseph Ferraro

Attorneys for
Tandem Productions, Inc.
330 Madison Avenue
New York, New York 10017

**Order Dated September 17, 1973 and filed September
19, 1973 Ordering CBS to Be Stakeholder and Viacom
International, Inc. and Tandem Productions, Inc. to
Interplead Their Respective Claims With
Respect to the Property**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

73 Civ. 2941 (MIG)

VIACOM INTERNATIONAL INC., *et al.*,
Plaintiffs,
against
TANDEM PRODUCTIONS, INC., *et al.*,
Defendants.

It appearing from the Second Amended Complaint, the Answer of Tandem Productions, Inc. ("Tandem"), and all other pleadings and proceedings had herein that plaintiffs and defendant Tandem have adverse claims with respect to certain property, described below, which is now or hereafter will be in the possession, custody, or control of Columbia Broadcasting System, Inc. ("CBS"); CBS having represented to this Court that it has no interest in such property and prayed that the Court order plaintiffs and defendant to interplead their respective claims with respect to such property; and this Court having found that CBS is a stake holder with respect to such property,

IT IS HEREBY ORDERED THAT

(1) CBS shall hold all such property, tangible or intangible ("the Property"), as it now has or may hereafter acquire, with respect to each episode of

Order

the television program ALL IN THE FAMILY, as is necessary to engage in the foreign syndication of that program and in the domestic syndication of that program after the completion of all network broadcasts, including

- (a) a color video tape,
- (b) a copy of the script, and
- (c) a copy of the music cue sheet,

subject to further order of the Court in this action directing CBS to deliver the Property to a party herein for foreign syndication or for domestic syndication after the completion of all network runs; and CBS agrees that it has no interest in the property which is the subject matter.

(2) CBS is dismissed as a party to this action.

(3) Plaintiffs and defendant Tandem shall within days hereof interplead their respective claims with respect to the Property; plaintiffs' Amended Complaint may be deemed their interpleader complaint if they so elect; and

(4) Neither plaintiffs nor defendant Tandem shall commence any other action or assert any claim against CBS with respect to the custody, control or disposition of the Property.

Dated: New York, New York
Sept. 17, 1973

M. I. GURFEIN
U.S.D.J.

A TRUE COPY

RAYMOND F. BURGHARDT, *Clerk*
By B. EDWARDS
Deputy Clerk

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TRIAL, SEPTEMBER 17, 1973
(Transcript, pages 2-26)

1 beg

2

2 THE COURT: Am I correct in stating, gentlemen,
3 that I have not yet signed the order for a realignment
4 of CBS?

5 MR. PEARSALL: As far as I know, your Honor,
6 you have not yet signed it.

7 THE COURT: Yes. I will hear argument on that
8 first. Mr. Rifkind goes first.

9 MR. RIFKIND: Your Honor, when I was last
10 before you at the end of July, you were kind enough to
11 suggest that I take a careful look at the decisions
12 in Independent Wireless.

13 THE COURT: 269US, I think it is.

14 MR. RIFKIND: We have now submitted a memorandum
15 to your Honor on that subject. I am really quite
16 contented to rely on the memorandum, but I would like just
17 to encapsulate it by making two or three points. I think
18 that the critical consideration in Wireless was that a
19 patentee, and I will accept the proposition that it would
20 likewise apply to a copywrite holder, is an indispensable
21 party to a lawsuit for infringement under the patent
22 or copyright laws, as the case may be.

23 I think the Court makes that very explicit,
24 and I would like to repeat one sentence to you from that
25 opinion, because it dramatizes, I think, the difference

1 bag

3

2 between that case and this:

3 "We recognize there is a tendency," said
4 Chief Justice Taft, "We recognize that there is a tendency
5 in the Courts of equity to enjoin the violation of
6 contract rights which are invaded by strangers in a
7 direct action by the party injured instead of compelling
8 a round-about resort to a remedy through the covenant,
9 express or implied, of the other contracting party,
10 but such a shortcut, however desirable, is not possible
11 in a case like this. A suit without the owner of the
12 patent as a plaintiff, if maintainable, would not be
13 a suit under Section 4921 of the revised statutes,
14 but only an action in equity based on the contract
15 rights of the licensee under the license and a stranger's
16 violation of them. There would be no jurisdiction
17 in courts of the United States to entertain it unless
18 by reason of diverse citizenship of the parties, which
19 does not exist in this case."

20 This is exactly the case supposed by the Court.
21 This is a diversity action, it clearly does not arise
22 under the copyright law given the decisions of this
23 circuit and others as to what it takes to arise under the
24 copyright law.

25 THE COURT: There is no argument about that.

1 beg

4

2 That is clear.

3 MR. RIFKIND: I think that's right. Thank you,
4 sir.

5 CBS is not the copyright holder.

6 THE COURT: That is where I am not sure I go
7 along with you, because it was a licensee which granted
8 a sub-license so that --

9 MR. RIFKIND: That is true, but I think it quite
10 clear that the Supreme Court in Independent Wireless
11 and in the subsequent cases under it recognized that you
12 did not have all the intervening licensees if you had the
13 original holder of the right.

14 For example, in Independent Wireless
15 General Electric was not a party although it was in the
16 chain of title of RCA.

17 THE COURT: I am not talking about the chain of
18 title. I am talking, and this is the basic thing that
19 I am concerned with, I based it largely on two things:
20 One, can I make an effective decree here which would
21 bind CBS; and number two, is not there a duty to defend
22 title which makes it better -- let's put it that way --
23 for CBS to be a party?

24 I have an open mind on it. I have
25 been thinking about it all weekend, and what I would

1 bsg

5

2 like to suggest to counsel is that CBS has proposed an
3 order which would in effect make this an interpleader,
4 and with the stipulation by CBS incorporated within that
5 order that it would be bound by the decree.

6 In that event it seems to me that my first
7 point becomes academic.

8 MR. RIPKIND: The complete relief.

9 THE COURT: Yes. As to the second point,
10 I am not sure, but I have a feeling that since Tandem
11 has also objected to CBS's being a party, that perhaps
12 we ought to do it that way. Otherwise, if I am wrong on
13 the realignment, the parties may go through a whole
14 proceeding and then find that there was no subject
15 matter jurisdiction, if Mr. Gould is right. I am not
16 saying that he is. I am not sure, but I think it is
17 a close enough question so that we ought to resolve it
18 that way.

19 Is there anybody that would oppose that?

20 MR. PEARSALL: Your Honor, I think there is just
21 one problem. The proposed interpleader is under Rule 22,
22 and as I understand the requirements for diversity
23 under Rule 22, there has got to be diversity between the
24 party who is seeking to interplead the two conflicting
25 parties, and of course, that diversity would not exist in

1 beg

2 this case.

3 However, as I understand the interpleader
4 statute, the diversity requirement is different, and
5 under the interpleader statute the exact number of which
6 I don't have at my fingertips, all that is required is
7 diversity between the two contending parties and not
8 between the stake holder and the contending parties.

9 THE COURT: That is what I think Mr. Rifkind
10 intends.

11 MR. RIFKIND: That is exactly right.

12 THE COURT: Let me put it this way:
13 If you would stipulate that your amended complaint may
14 be treated as an interpleader complaint, Mr. Gould would
15 then withdraw his motion, if it is a motion -- I think
16 it is only a letter -- and I would grant CBS's motion
17 to dismiss CBS as a party on condition that the order
18 proposed by CBS be signed by me.

19 MR. PEARSALL: I have no objection to that.

20 THE COURT: In other words, I want to protect
21 both you and Mr. Gould and whoever wins this case ought
22 not to have to take another proceeding against CBS in
23 order to get their film.

24 MR. PEARSALL: I am in complete agreement with
25 that.

1 bsq

7

2 THE COURT: Or their negative. Have you any
3 objection, Mr. Gould, to that.

4 MR. GOULD: Would you just forgive me a moment?
5 Does your Honor want to hear from me on this?

6 THE COURT: Yes, sir, briefly.

7 MR. GOULD: I won't make any extended argument.
8 You see, I am in this position: Here is a purported
9 assignment by CBS to Viacom. We, of course, challenge
10 the validity of the assignment. Forget the antitrust
11 aspects of it, and we say, "You had no right to assign
12 it."

13 I think that is very clear.

14 So that what we would like to do is to have
15 an adjudication here on all the points including --

16 THE COURT: But you will have one in the form
17 of this order. The order will provide --

18 MR. GOULD: I am not sure of that, your Honor.

19 THE COURT: I am sure. The order will provide--

20 MR. GOULD: I think under this form we certainly
21 wind up with another case.

22 THE COURT: No, I don't think so. What you
23 have here, Mr. Gould, is a peculiar thing. You have a
24 sub-license for the exploitation of certain rights in
25

1 beg

2 a copyright. That is what it amounts to. The problem is
3 you can't dispose of it physically as you would a
4 commodity, because it doesn't exist except in the air.
5 Therefore, you must have access to the negative or to a
6 dupe in order to function, or to a tape as the case may be.

7 If I order them under all circumstances to
8 give you, if you win, the dupe or the negative or the tape
9 or whatever else you need --

10 MR. GOULD: That isn't what concerns us, your
11 Honor. We are not concerned only with the negatives, the
12 physical property. We are concerned with an adjudication
13 of the elemental rights.

14 THE COURT: I know what your concerns are.
15 You are not going to do that to me. You are concerned with
16 trying to create a situation where there is no subject
17 matter federal jurisdiction, and I am not going to go for it.
18 I don't think you have any practical reason, Mr. Gould.

19 MR. GOULD: I do have a practical reason.
20 I don't want to have to try two cases.

21 THE COURT: What?

22 MR. GOULD: I don't want to have to determine
23 who owns these rights as between CBS and ourselves later
24 on.

25 THE COURT: They are agreeing to be bound. They

1 beg

2 will amplify it if you want to. You can expand the order.
3 They are not interested in that.

4 MR. RIFKIND: I really don't know what more
5 than all property tangible or intangible requisite to
6 syndication one could give, but I will give anything
7 your Honor thinks appropriate.

8 THE COURT: I think it's enough, but if you want
9 to suggest some language, Mr. Gould, I will take the
10 language. Mr. Shelton, what do you want to suggest?

11 MR. GOULD: Let us just confer about it for a
12 moment. We have a problem about it. Let us at least
13 see if we can agree among ourselves on this.

14 Your Honor has indicated what you would like to
15 do, and it makes it a little difficult for me, but let
16 me see if I can think of something.

17 THE COURT: No, it doesn't. All I am suggesting
18 is you can't talk in vacuo. Take a look at the order
19 proposed by Mr. Rifkind.

20 MR. GOULD: I have it right in front of me.

21 THE COURT: Look at it and see if you want to
22 add some words.

23 MR. SHELTON: Your Honor, can I say something?

24 THE COURT: Surely.

25 MR. SHELTON: The physical negative is not a

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2 problem. As a matter of fact, we have it. CBS doesn't
3 even have it, and we can make all the duplicates we want.
4 At least that is the way I understand it.

5 Our problem is very simple, and it goes to a
6 different problem, your Honor. There was a grant of rights
7 to CBS which we claim are illegal for various reasons.
8 In addition, we claim that those rights were never assigned
9 effectively to Viacom, in addition to other things, that
10 they couldn't be assigned, and supposing your Honor finds
11 for example, that the rights were never assigned to
12 Viacom or never effectively assigned to Viacom.

13 Does that mean that CBS is willing to get up
14 in Court now and stipulate that if the Court so finds
15 Tandem has got the rights?

16 THE COURT: Sure.

17 MR. GOULD: Let's hear that. That would
18 simplify it.

19 THE COURT: I don't know how you can --

20 MR. RIFKIND: That is just explicitly what
21 we want.

22 MR. GOULD: Show me where it says so.

23 MR. RIFKIND: I say that we shall hold all
24 property, all the relevant property subject to any further
25 order of Judge Gurfain as to where it should be delivered.

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2 MR. GOULD: If your Honor pleases, what
3 concerns me is if they will stipulate now or include in
4 the order that in the event that there is an adjudication
5 that Viacom hasn't got the rights, that they belong to
6 Tandem and not to CBS --

7 THE COURT: Don't put it that way. Put it that
8 either side, whichever side prevails in this litigation,
9 there is no claim by CBS that the order of this Court
10 shall not be obeyed.

11 MR. RIFKIND: That is exactly right. Whatever
12 the disposition of the property, I assert that CBS does not
13 have a claim to it.

14 THE COURT: Yes.

15 MR. GOULD: That is what I want to hear.
16 In other words, CBS says that if it is adjudicated that
17 Viacom hasn't got these rights, then they don't belong
18 to CBS?

19 MR. RIFKIND: They do not belong to CBS.

20 THE COURT: They will certainly stipulate to
21 that. I think it's right here, but anyhow --

22 MR. GOULD: I don't see it in the order. That is
23 what I have been looking for.

24 MR. RIFKIND: I so stipulate.

25 THE COURT: If they hold it for you, they don't

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2 have it, but anyhow that is what I meant before by an
3 intangible.

4 MR. RIFKIND: I am just looking to the possibility
5 that the Court holds that the rights should be
6 delivered to the community chest or some other organization.
7 I don't know.

8 MR. GOULD: No, no, what I want him to do is
9 to stipulate that if --

10 THE COURT: Why don't we just say, "And CBS
11 disclaims any rights to the matter in suit."

12 MR. GOULD: That is what I want.

13 THE COURT: They will be glad too.

14 MR. GOULD: That is what I want.

15 MR. RIFKIND: CBS disclaims any interest in
16 the syndication rights to "All in the Family."

17 THE COURT: And you have to include the
18 foreign exploitation rights, don't you.

19 MR. RIFKIND: Foreign and domestic syndication.

20 THE COURT: Yes.

21 MR. GOULD: That is it, foreign and domestic
22 syndication rights. I think that ought to be included
23 in the order.

24 THE COURT: It should be, yes.

25 MR. GOULD: It's not here.

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THE COURT: Just give me the words and I will do it.

MR. RIFKIND: It does provide for a finding by the Court that CBS has represented to the Court that it has no interest in such property. I don't know what more I can say.

MR. GOULD: I want it in the order language.

MR. RIFKIND: You asked for our stipulation. We have represented to this Court that CBS has no interest in such property.

THE COURT: That is what I thought they had done.

MR. GOULD: It says so here that they have represented to the Court that they have no interest. That doesn't mean to me --

MR. RIFKIND: I would think I was barred by that representation.

THE COURT: At the end of paragraph 1, why don't you just add a few words for repeating what it is in the "whereas" clause. "And CBS agrees that it has no interest in such property."

Is that agreeable, Mr. Rifkind?

MR. RIFKIND: That is fine.

THE COURT: At the end of paragraph 1 I will write

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2 it in.

3 MR. SHELTON: Your Honor, can I just put a
4 question to the Court? May I?

5 THE COURT: You can put a question, yes.

6 MR. SHELTON: Supposing the Court would find
7 that there has been no effective assignment. What happens
8 at that point?

9 MR. GOULD: On this stipulation, the rights
10 revert back to Tandem.

11 MR. SHELTON: Very good.

12 MR. PEARSALL: Your Honor, I think there is a
13 point that is being made here that may not be totally
14 apparent. There is a contention by the defendant in this
15 case that regardless of whether or not CBS had the right
16 to assign to Viacom, it never did so.

17 Frankly, I think that is a completely frivolous
18 contention, but were the Court to conclude that CBS had
19 the right to assign the syndication rights, but that in
20 fact never did so, then in that circumstance CBS would
21 still own the syndication rights and have the right to
22 assign under the syndication agreement to Viacom.

23 I am not going to object --

24 THE COURT: They are quit-claiming that now.

25 MR. PEARSALL: You see the point basically is

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this: Mr. Shelton's remarks I understand to be directed to a very specific possibility, and that is the possibility at the conclusion of this trial your Honor will conclude that, yes, CBS did have the rights, yes, CBS did have the right to assign, no, CBS never got around to assigning to Viacom.

In that case I would expect that under the syndication agreement, were the Court to conclude that this worthy case, that the very next day CBS would assign its rights to Viacom because what the contention is is that we are talking about now, not that they didn't have the right to assign, but that they never got around to assigning.

That is the contention to which Mr. Shelton is now directing his attention. Were the Court to reach that very unlikely conclusion, in that instance I certainly don't want to be bound by the idea that because they did not assign to Viacom, although they had the obligation to assign to Viacom, that somehow the rights have automatically reverted to Tandem because that is not the law or the fact.

I think maybe that is what Mr. Shelton is trying to --

MR. GOULD: Of course, that is what we are trying

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to do, because they can't have it both ways.

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Either CBS belongs in this case as a party defendant,

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and if you read the original complaint, that is the way

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it was framed, because they haven't got an assignment.

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MR. PEARSALL: Yes, we do, your Honor.

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MR. GOULD: Well, there is a question as to whether it was effectively assigned. Let's put it that way. We contend it was not, they contend it was, and so the whole development of the case was that CBS should be in here, from our point of view, and it should be in here for this precise reason.

They would like to play it both ways --

THE COURT: You would like to play it both ways.

MR. GOULD: No, I wouldn't like to play it both ways.

THE COURT: You want CBS in as a defendant to oust me of jurisdiction, and you know that Tanden can't be served in the state court, and you are home free, except for a suit in California.

MR. GOULD: Your Honor know that to say -- to phrase it that I want to oust you from jurisdiction is to--

THE COURT: Not me, I mean the court.

MR. GOULD: -- is to make an imputation that I certainly don't intend.

THE COURT: No, I don't mean that. I mean the federal court, which is your privilege and your right, because we are a court of limited jurisdiction.

MR. GOULD: I want to say right now that if they want to sue in the state court here, subject to only checking with the client, I would be inclined to give them jurisdiction.

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2 THE COURT: You want to get it out of the federal
3 court, but that doesn't mean anything to me.

4 MR. GOULD: No, I don't think it should.

5 THE COURT: If I have jurisdiction, I have it.
6 If I don't, I don't.

7 MR. GOULD: I want to play it in the way that gives
8 my client the fullest protection, and I think the way it does
9 that is to have CBS in as a defendant.

10 Unfortunately, if I could say to your Honor, let
11 him in as a defendant, the court still has jurisdiction, I'd
12 be a happy kid.

13 THE COURT: But you could have started an action
14 against CBS in the state courts, which you didn't do.

15 MR. GOULD: Then what would we have done? We
16 wouldn't have had this case.

17 THE COURT: I don't know what you would have had.

18 MR. GOULD: We would have had a mishmash then,
19 your Honor, two different cases.

20 MR. PEARSALL: Excuse me, your Honor, I think
21 that really cutting through all this, the simplest fact is
22 that there is no need for CBS to be a party to determine whether
23 or not the assignment was effective.

24 Certainly the interpleader approach has been
25 proposed by Mr. Rifkind protests both parties, and so far as

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2 this one open question is concerned, certainly CBS does not
3 need to be a party for proper determination of that issue. 19

4 THE COURT: Not going to what?

5 MR. PEARSALL: CBS does not need to be a party to
6 a determination of that issue. There is no reason why, for
7 determination of that question, the one single question that
8 Mr. Gould has now developed, there is no reason why for a
9 determination of that question in this court CBS needs to be
10 a party.

11 THE COURT: No, I don't see either why it has to
12 be in there. I will either decide there was never a grant,
13 in which event it remains with Tandem, or if I decided there
14 was a grant, then I have to decide whether or not there was a
15 proper assignment and whether it's a defense.

16 MR. GOULD: All right.

17 THE COURT: If I decide there wasn't a proper
18 assignment, then apparently CBS is willing to allow a reversion
19 to the grantor, and I don't see what Viacom would have to say
20 about that.

21 MR. GOULD: That is fine with me.

22 MR. PEARSALL: We have a contractual right to
23 receive the assignment. Of course, if you determine we did
24 not have a contractual right to receive the assignment, then
25 that is a different situation altogether, quite right.

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2 MR. RIFKIND: I would suppose if they had a
3 contractual right to receive the assignment, I would consider
4 the court would deem that done which ought to be done.

5 THE COURT: Equity being that done which ought to
6 be done.

7 MR. GOULD: I thought that was his point. In view
8 of what your Honor says, I will accept this order with that
9 amendment which gives expression to the one thing that concerns
10 me.

11 THE COURT: I am going to put in, "And CBS agrees
12 that it has no interest in the property which is the subject
13 matter of the suit."

14 MR. GOULD: It is the foreign syndication and
15 domestic syndication.

16 MR. RIFKIND: Where does that appear, your Honor?

17 THE COURT: I put it at the end of paragraph 1,
18 at the bottom, "And CBS agrees that it has no interest in the
19 property which is the subject matter of the suit."

20 MR. GOULD: Would your Honor add, "And that if it
21 is determined that no assignment was made, the rights revert
22 to the grantor"?

23 THE COURT: I can't decide that in advance.

24 MR. GOULD: That is the sense of what this is.

25 THE COURT: It is the sense, but I am not going to

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2 put it in.

3 MR. GOULD: Because that is the question the client
4 is going to put to me when we tell him about this.

5 THE COURT: All right, we will adjourn now and I
6 will take the criminal case that has been waiting.

7 (Recess.)

8 MR. GOULD: If your Honor pleases, before we get
9 to this question of the anti-trust thing, I am somewhat con-
10 fused with respect to this order on CBS. My confusion derives
11 from the fact that the order apparently was designed to take
12 care of the assumption that they were holding the property
13 which was necessary to the appropriate implementation of the
14 syndication process.

15 At this moment it appears they may be holding some
16 property, we are holding most of the property, that is, my
17 client, and the real problem is not with respect to the property
18 but with respect to the point that I made before, which is the
19 ultimate ownership of the syndication rights.

20 At this moment I recognize we are only dealing with
21 that question as between CBS and Tandem. I don't know, I
22 haven't got the text of what your Honor has written into the
23 end of paragraph 2 of this --

24 THE COURT: Mr. Hughes will read it to you.

25 THE CLERK: There is added, "And CBS agrees that

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2 it has no interest in the property which is the subject matter
3 of the suit."

4 MR. GOULD: If your Honor pleases, the term
5 property as you have used it is something I believe is distinct
6 from the term property as defined in the first paragraph of
7 the order.

8 In the first paragraph of the order it says,
9 "CBS shall hold all such property, tangible or intangible,"
10 I think your Honor means, when he says that the property which
11 is the subject matter of the suit, the negatives and the
12 other physical, tangible materials which are required for the
13 proper execution of the syndication agreement.

14 What I am talking about, what I think is the sub-
15 ject of this suit is the elemental syndication rights, and
16 I think this is the time to get that straightened out. What
17 I am trying to get CBS --

18 THE COURT: What does intangible property mean
19 here to you?

20 MR. GOULD: I don't know.

21 THE COURT: I do. Intangible property is the
22 sub-license.

23 MR. GOULD: The syndication rights?

24 THE COURT: Sure.

25 MR. GOULD: Is that what they intend?

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THE COURT: That is what they intend.

MR. GOULD: And that is what your Honor intends?
I don't mean to catechize the court, forgive me.

THE COURT: No, please do.

MR. GOULD: That is what your Honor intends in
granting this application and signing the order --

THE COURT: That's right. The property is defined
up above, if you look at it, the property tangible or intan-
gible. You don't read it, that is the trouble.

MR. GOULD: Which is now or hereafter will be in
the possession, custody, or control of CBS, and right now
certainly the syndication rights are not in the possession,
control, or custody of CBS.

THE COURT: It may hereafter acquire them, accord-
ing to your version, and therefore they are quit-claiming.
It's as simple as that.

MR. GOULD: I am beyond the point I was before,
at least.

THE COURT: I think you are looking for something
that isn't there. I don't blame you for being careful, but I
can't understand, when property is defined as tangible or
intangible, what else it can mean.

MR. GOULD: As long as there is a clear under-
standing of it by the participants, byt the court, CBS, Viacom,

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2 and ourselves that the intangible property we are talking
3 about is the foreign and domestic syndication rights, then I
4 can't quarrel with the language. That is what troubled me.

5 THE COURT: The only one you can quarrel with is
6 Mr. Pearsall, and I have sort of overruled him, because the
7 effect of it would be that if CBS is found not to have granted
8 it to Viacom, then it doesn't have the power to do it now,
9 because Equity could still do it if it wanted to, do what
10 should have been done earlier, then CBS having renounced the
11 rights, can't go anywhere else but to Tandem. Where else
12 would it be?

13 MR. GOULD: There is nothing more I can say about
14 it. Your Honor has granted their application. Your Honor has
15 made the order with that provision in it, and we have that.

16 THE COURT: Incidentally, it is partly for your
17 protection so that in the event you should win, you won't have
18 to relitigate again on the ground that there was no federal
19 subject matter jurisdiction, which could well be the ruling on
20 this question of alignment. Nobody else can be as clear, be-
21 cause the cases are somewhat in conflict.

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2 THE COURT: And I don't know what the Court of
3 Appeals would do on that, or the Supreme Court. I think the
4 better part of valor is to do it this way.

5 MR. GOULD: One other thing I have forgotten about.
6 In paragraph two of the ordering language in the order your
7 Honor has signed there is a provision that CBS is dismissed
8 as a party to this action and is discharged from all further
9 liability to plaintiffs and attendant with respect to the
10 property.

11 Now, if your Honor please, since we have expanded
12 the definition of property so that it included the syndication
13 rights, I don't think that your Honor --

14 THE COURT: I agree with you; I think I will dis-
15 charge that further liability.

16 MR. GOULD: There certainly is no adversarial
17 proceeding between us on that point and I think that should
18 come out.

19 THE COURT: It is dismissed as a party to the action
20 only.

21 MR. RIFKIND: If you strike that language which
22 follows, logically a negative implication might be attached to
23 the deletion.

24 THE COURT I substituted for it up above
25 "CBS agrees it has no interest in the property"; that nobody

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2 can start an action against it.

3 MR. RIFKIND: Very well.

4 THE COURT: I am going to strike that.

5 You don't need "Except as provided in paragraph one.
6 We will strike that also.

7 Paragraph 2 will read: "CBS is dismissed as a
8 party to this action."

9 MR. GOULD: Just one more final suggestion I would
10 like to make. The language in paragraph 4 with respect to
11 asserting a claim against CBS with respect to the custody,
12 control and disposition of the property is limited strictly
13 to what it says there. In other words, if we were going to
14 have a plenary action against CBS now for violation of the
15 anti-trust laws it cannot be cut off.

16 THE COURT: No.

17 MR. GOULD: By this language.

18 THE COURT: No, that is why it is limited to cus-
19 tody, control and disposition, not ownership. It says nothing
20 about a claim for treble damages against CBS.

21 MR. GOULD: I just want to be sure, your Honor.
22 Thank you.

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TRIAL, SEPTEMBER 17, 1973
(Transcript, pages 26-71)

23 MR. DONOVAN: Turning now to the motion, my name
24 is John Donovan. I am with Hughes, Hubbard and Reed.
25 The motion we make is pursuant to Rules 12 and 56 for partial

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2 summary judgment dismissing the defense of antitrust illegality
3 which Tandem has asserted as the fifth affirmative defense
4 in his answer.

5 In its brief in opposition to this motion Tandem
6 has raised the threshold question of whether there are genuine
7 issues of fact which preclude partial summary judgment.
8 Clearly, I think, your Honor, there is no such issue which
9 Tandem has raised.

10 Tandem has made no response whatsoever to Viacom's
11 Rule 9 (g) and under that rule the facts in that statement have ,
12 therefore, been admitted. Moreover, Tandem did not even sub-
13 an affidavit in opposition to that motion, and in accordance
14 with the provisions of Rule 56 (e) that does not raise any
15 genuine issue of fact --

16 THE COURT: Let me say this: I have the option,
17 as I believe, to not treat it as a Rule 56 motion if I decide
18 to do that. And that is what I am going to do. So forget
19 about all this and discuss it as if it were a motion addressed
20 to the pleadings.

21 MR. DONOVAN: I think, however, there are facts,
22 your Honor, which should be considered on this motion. In
23 particular I would like to address your attention to the facts
24 concerning a separate defense and I think the facts that Tandem
25 has accepted all the benefits of the contract -- these are facts

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2 which we put in the Rule 9(g) statement and I think they are
3 quite important under this motion. It is for this reason we
4 have converted it from a rule 12 motion to a rule 56 motion.

5 THE COURT: It is like a running demurrer, as they
6 used to call it. I will take that into account because it is
7 not disputed.

8 MR. DONOVAN: I think, in any event, there is no
9 genuine dispute as to any of the facts which are germane to the
10 motion.

11 THE COURT: I would say this: If I had more time
12 I would say to Mr. Gould they ought to put in an answer to
13 Rule 9 (g), as the rules require.

14 MR. GOULD: If your Honor please, I thought we had
15 covered this problem, and if there is no piece of paper before
16 the court on this it is because of a misunderstanding. I
17 thought we agreed that we would argue this this morning and
18 then we would be given additional facts to put in papers in
19 opposition if the necessity arose.

20 THE COURT: That is true, except a 9 (g) statement
21 is obviously like a pleading.

22 MR. GOULD: I know, but we just haven't had time to
23 do that. And I certainly thought the arrangement --

24 THE COURT: I am not going to decide it now. I
25 am just hearing oral argument on it.

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MR. GOULD: Very well, but I don't want to find myself in the position here where there is a motion for summary judgment and I have been asleep and everything has been agreed to and accepted and not denied.

THE COURT: I won't do that. Skip that part of the argument and argue on the merits.

MR. DONOVAN: All right. Just to set up the factual background, on or about July 10, 1970 CBS and Tandem entered into an agreement, valid on its face, relating to the TV program ALL IN THE FAMILY. They agreed that Tandem would produce episodes which CBS would broadcast on the CBS television network; that CBS would have syndication and distribution rights, and that CBS and Tandem would receive the license and distributions fees set forth in the agreement.

The program was produced and broadcasted, and it has turned out to be a great success.

In response to certain FCC regulations, CBS divested itself of its syndication business to Viacom. The FCC examined this spin-off transaction and ruled that it effectively divested CBS of any interest in the syndication business of the fully independent Viacom.

THE COURT: That was after the grant.

MR. DONOVAN: It became effective, your Honor, on June 4, 1971.

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THE COURT: Then wasn't there an extension of time?

MR. DONOVAN: The FCC said the spin-off transaction effectively divested CBS of any interest, and it eventually became effective after the FCC ruled approving the transaction on June 4, 1971.

In connection --

THE COURT: Wasn't there an extension during that summer of the divestment of this license syndicate?

MR. DONOVAN: Under the financial interest rule.

MR. PARVER: You are talking about the stay of the rule?

THE COURT: Yes.

MR. PARVER: Yes, your Honor, the financial interest was stayed July 23, 1971.

THE COURT: What is the date of the agreement?

MR. PARVER: The agreement was dated and the original oral agreement was entered into in early July 1970, dated July, 1970, a year prior to the effective date of the rule.

THE COURT: That was what I thought, yes.

MR. DONOVAN: In connection with the spin-off transaction which became effective on June 4, 1971, CBS assigned to Viacom the syndication rights to ALL IN THE FAMILY. Subsequently, Tandem reached its contractual obligations relating to the syndication rights, and then Viacom commenced this suit

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2 to enforce the contract.

3 In its fifth defense, Tandem claims that CBS coerced
4 Tandem into granting the syndication rights by conditioning
5 Tandem's access to the CBS television network during prime
6 evening hours on the granting of such rights.

7 THE COURT: Wait a minute. For the purposes of this
8 motion you assume that to be true, I take it.

9 MR. DONOVAN: That is correct, your Honor. Tandem
10 apparently contends that this violated sections 1 and 2 of the
11 Sherman act and also section 340 of the New York General
12 Business Law.

13 Plaintiffs' position on this motion is that the
14 well established line authority exemplified by the Supreme
15 Court's rulings in Bruce's Juices v. American Can Co. and
16 Kelly V. Kosuga precluded Tandem from using alleged antitrust
17 violations by CBS as a justification for its refusal to pay
18 Viacom the agreed consideration for the benefits which Tandem
19 has received under a contract valid on its face.

20 The general rule, which the Supreme Court enunciated
21 in these cases, is that a defense of illegality predicated upon
22 alleged violations of the antitrust laws is insufficient to
23 defeat an action on the contract. Plus, the federal courts en-
24 force the contractual obligations and require the defendant
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2 to seek redress for the antitrust violations and the manner
3 which Congress intended -- by affirmative suit for treble
4 damages.

5 This rule is founded upon three basic policy con-
6 siderations, all of which are applicable in the present case.

7 First, a party should not obtain the benefits of
8 a contract without consideration.

9 In the present case, Tandem has obtained all the
10 benefits of the contract and intends to continue receiving them.
11 Nevertheless, --

12 THE COURT: They claim, don't they, while there was
13 one contract there are really two separable documents which
14 just happened to be in the same contract, and normally since
15 you can sell syndication rights separately that these were
16 two separate actions?

17 MR. DONOVAN: Well, in the context of this particular
18 action, I think, your Honor, Tandem can't have it both ways.
19 They contend, on the one hand, that the sine qua non of CBS
20 agreeing to broadcast their program was giving up the syndica-
21 tion rights. If that is correct, then obviously the syndication
22 rights are the consideration for network broadcast and vice
23 versa.

24 If the syndication rights and network broadcasts are
25 entirely independent of each other, have nothing do with each

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2 other, then Tandem is conceding their defense is a sham.

3 I don't think they can have it both ways.

4 THE COURT: I know, but suppose you have a case
5 where Standard Oil Company says that "I will let you have a
6 dealership, or a gas station provided that you buy tires from
7 us." Now, they pay for the gas whatever everybody else does.
8 Then when it comes to a question of whether or not they have
9 to pay the tires supplied by Standard Oil they say, "No, be-
10 cause the tires were forced on us by a tying agreement that
11 was illegal. What case have you got that would say that the
12 gasoline station dealer in that circumstance would not have a
13 defense under the Sherman act?

14 MR. DONOVAN: Well, I think there are several
15 cases that deal with this. I think the Supreme Court's decisions
16 themselves are sufficient. A not dissimilar situation is the
17 Royster case which Tandem has relied upon in its brief. This
18 is an illegal reciprocal dealing arrangement. The court
19 assumed the illegality of the illegal reciprocal dealing ar-
20 rangement. It found, however, that it would never let them
21 enforce the contract.

22 I don't see in this particular case that we have
23 to go off and enforce the contract. We have one unitary con-
24 tract and the quid pro quo is the producing of episodes and
25 giving up the syndication rights. If there were instances such

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2 as your Honor suggests where two separate and independent
3 agreements were made perhaps the giving of the service station
4 would not in fact be consideration for the purchase of tires
5 and batteries and accessories. I don't think that is in this
6 case.

7 THE COURT: What I am really asking is, suppose
8 what came up was in terms of a supply contract as to which
9 Standard Oil sought specific performance. I am trying to get
10 a case where the defendant says, "I don't have to take the
11 tires even though I contracted for them because they are the
12 products of an illegal tying arrangement forced upon us by
13 monopolies."

14 Can they then defend on the theory that if the
15 court enforces it it's enforcing an illegal contract?

16 MR. DONOVAN: I think not, your Honor, and I think
17 that is the Royster case. In the Royster case the situation
18 where Royster sought to enforce the executory portion of a
19 contract by which Columbia Nitrogen had agreed to purchase
20 phosphate from Royster. They then said, "Oh, well, we don't
21 want to go ahead with the purchase of phosphate as part of an
22 illegal reciprocal arrangement."

23 The court, nevertheless, enforced the contract.

24 THE COURT: You cite that Royster case?

25 MR. DONOVAN: Yes, I do, your Honor, in the reply

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2 brief.

3 THE COURT: Where?

4 MR. DONOVAN: Tandem also cites it.

5 THE COURT: No, but where do you cite it, at what
6 point?

7 MR. DONOVAN: I think you will find it on pages 10
8 and 11.

9 MR. GOULD: Ten and 11 of what?

10 MR. DONOVAN: The reply brief.

11 THE COURT: The reply brief.

12 MR. DONOVAN: There are lots of situations, your
13 Honor, where the courts have enforced executory contracts des-
14 pite the assertion of an antitrust illegality defense, if that
15 is what your Honor is addressing yourself to.

16 Judge Palmieri in the Automatic Canteen case, for
17 example, was dealing with a situation where in an exclusive
18 distributorship contract which the manufacture was breaching,
19 he, the local distributor, asserted the defense that the
20 exclusive distributorship contract was a violation of the anti-
21 trust laws. Judge Palmieri enforced the contract despite the
22 fact it had 18 additional years to run.

23 THE COURT: The difficulty about Royster is that
24 there the court says the reciprocal dealing had been finished.

25 MR. DONOVAN: I think that is exactly the case here

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2 as well. CBS having departed from the syndication business it
3 is obvious the court in enforcing this contract cannot accomplish
4 the anti-competitive effect which is the subject matter of the
5 antitrust violation which Tandem alleges.

6 THE COURT: That is from the point of view of CBS,
7 but from the point of view of Tandem, if they were hurt, they
8 were hurt badly.

9 MR. DONOVAN: The point of these cases, your Honor,
10 is that the focus of the antitrust laws is the protection of
11 competition, not competitors. I think that the courts have
12 adopted a general rule against allowing the defense of il-
13 legality in contract actions, antitrust illegality in contract
14 actions. The only time they depart from that rule is when the
15 court's own decision enforcing the contract is going to ac-
16 complish a harm to competition. Here --

17 THE COURT: It is the same thing. Suppose somebody
18 stole the rights by forgery and then the court was asked to
19 enforce it. The court doesn't enforce that sort of thing.

20 Now, if you have a clear antitrust violation where,
21 assuming for argument's sake, Tandem was compelled to give up
22 these rights almost at the point of a gun, let's say, by CBS
23 in order to get network coverage, then why am I not enforcing
24 an illegal contract?

25 MR. DONOVAN: Your Honor, there are --

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2 THE COURT: You need the court to get somewhere,
3 to get somebody. You need the intervention of equity.

4 MR. DONOVAN: True.

5 THE COURT: Let me ask you this: These cases deal-
6 ing with damages, are they different in time from cases dealing
7 with equitable relief?

8 MR. DONOVAN: No, they are not.

9 THE COURT: Why?

10 MR. DONOVAN: I will cite your Honor Judge
11 Palmieri's decision in Automatic Canteen in which he enforced
12 a contract which had 18 additional years to run.

13 I would cite the Nassau Sports against Peters
14 case, decided in the Eastern District just last year. There
15 the decision was really almost identical to the kind of defense
16 we have here. The plaintiff was a national hockey league team
17 which sought an injunction against one of its players breaching
18 its playing contract and jumping to a team in the rival World
19 Hockey Association.

20 The defense that was put in in that case was that
21 the only obligation he had to perform for the next year for the
22 national hockey league team rose out of their reserve law
23 clause in the contract. The reserve clause of the contract
24 was the very instrumentality, with the gun, in effect, that
25 the National Hockey League used in order to monopolize the

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business of professional hockey.

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And Judge Weaher said the contract is valid on its face, is not intrinsically illegal, and he enforced the contract and let the player pursue his remedy by an affirmative antitrust case of his own.

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The policy that we are dealing with here is different than the normal contract of illegality --

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THE COURT: Have you got a case in the Court of Appeals or in the Supreme Court itself dealing with the question of posing where instead of a defense to a claim for damages you have a claim for an affirmative equitable relief as to whether or not a violation of Sherman One or Two is not a defense? Take your time and think about it because I am not trying to be funny about this.

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MR. DONOVAN: I understand, your Honor.

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THE COURT: I am trying to pinpoint the things so that my own mind can follow what the argument is.

MR. DONOVAN: Dickstein against duPont in the First Circuit was for granting equitable relief in a contract action.

In Nassau Sports which I previously mentioned.

Also New York Automatic Canteen.

THE COURT: That is the lower court again.

MR. DONOVAN: Those are lower court cases in this district. There are no germane cases in this circuit, in this

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2 circuit court.

3 THE COURT: Let me ask you then: Is it a case of
4 first impression as far as you know? Go ahead, tell me if
5 there is another case. I would like to hear it.

6 MR. PARVER: May I confer with him just a second?

7 THE COURT: Surely.

8 MR. DOVONAN: I don't think this is a case of first
9 impression. I don't see any distinction between this and the
10 rationale of Kelly against Kosuga. I think there are cases
11 where while the court is not perhaps granting equitable relief,
12 they are granting, particularly in circumstances that obtained
13 at that time, damages for things which have not been received,
14 which is, in effect, the same thing. It just depends on which
15 side of the contract you are on. One side requires performance.
16 On the other side, to require, you know, the remedy can be the
17 damages.

18 However, for example, Judge Palmieri and Judge
19 Weather have dealt with this. They did not find any difficulty
20 in applying the same rationale in cases where they were grant-
21 ing equitable relief to enforce contractual obligations in
22 spite of a defense very similar to what you have here.

23 THE COURT: Well, let me put it another way. I
24 don't know whether the distinction makes a difference, but what
25 about intangibles? Have you got any case dealing with an

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2 intangible like a franchise or a license or a sublicense under
3 a copyright?

4 MR. DONOVAN: The right to apply for services, I
5 think in Nassau Sports would be very much the same thing.

6 THE COURT: No, that is a personal service con-
7 tract; that is not a status. I am talking about a patent,
8 a copyright, a sublicense of specific rights, of exploitations,
9 a moving picture, anything like that.

10 MR. DONOVAN: I do have a moving picture case, but
11 it involves again the other side of the deal. The New York
12 case of Loves against Radio Hawaii involved a block booking
13 defense to a suit on a contract and there the court enforced
14 the contract relied on in Kelly v. Kosuga.

15 THE COURT: I think there is a second circuit
16 case like that.

17 MR. DONOVAN: I do not know of any.

18 THE COURT: It is a question of standing. There is
19 the case of a television station.

20 MR. DONOVAN: American Manufacturer Mutual Insurance
21 Company. There are several decisions and two, at least, in the
22 Second Circuit. The one closest to this situation I think
23 deals with the requirement of showing coercion in order to
24 show a tie.

25 There the situation was a sponsor of a television

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2 program who signed up for, oh, I think it was 135 stations,
3 who later said really all he wanted was 95 stations and that
4 they had imposed upon him the remaining unwanted stations.

5 The Court of Appeals held that they had to show,
6 in order to recover -- and they had failed to do so -- that
7 the network had had economic power which it actually employed
8 to beat him into the unwanted stations and that they had failed
9 to do so and sustained the district court's posttrial ruling
10 to that effect.

11 THE COURT: I guess I interrupted you enough. Did
12 you care to make any other points?

13 MR. DONOVAN: I think there are a couple of things
14 I would like to cover.

15 We talked about the receipt of benefits, and I
16 think I would just like to emphasize again I don't think
17 Tandem can have it both ways. If they say the thing which
18 forced them into this contract, the only way they can get
19 access to television network broadcasting was by giving up
20 syndication rights then clearly they are saying that the
21 benefits they had received by the network broadcasts of a
22 consideration for syndication rights. If that is not the case,
23 then their defense is a sham.

24 If they are entirely independent, there cannot have
25 been any coercion.

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2 THE COURT: I will let Mr. Gould handle that.

3 MR. DONOVAN: I think I would like to talk a little
4 bit about the executory contract distinction which Tandem
5 attempts to make in its brief. Tandem says that really Bruce's
6 Juices and Kelly against Kosuga are really different on this
7 case because on this particular divided theory it has the
8 contract. It says the benefits had not been received here and
9 the benefits had been received there. That is not accurate.

10 First of all, in Kelly against Kosuga, there was
11 an application for 50 carloads of onions. The first 13 had
12 been delivered and paid for. The suit was relating to the
13 last 37 carloads which had not been delivered, no benefits
14 had been received and the court enforced the contract for the
15 purchase of the 37 carloads of onions.

16 In Judge Palmieri's case, Automatic Canteen, which
17 we talked about before, there again there was an enforcement of
18 an executory promise.

19 Nassau Sports again required an executory promise
20 to be enforced.

21 I think we should talk now about Associated Press
22 against Taft-Ingalls Corporation --

23 THE COURT: You don't have to go into that. When
24 I was a lawyer I followed it and argued on it strongly, but
25 as a judge I think it was wrongly decided.

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MR. DONOVAN: I agree with that, your Honor.

THE COURT: It is not for me to say, except it was a two to one decision. It is obvious they stated the facts wrong in the majority opinion.

MR. DONOVAN: I think that is correct. I think the dissenting opinion refers to the Kelly rule and the circuit divided somewhat, but they had two subsequent cases -- Atlantic Richfield versus Malco Petroleum and Buffler versus Electronic Computer in which they refused to allow a tie-in defense.

THE COURT: I am familiar with it. Levin against IBM was before Judge Laska. It hit me on the head.

MR. DONOVAN: Yes, it did.

Two other policies which underline this rule, which apply here, I think, is the question of not adding to the exclusive sanctions which Congress has provided under the antitrust laws. The avoidance of contracts was not something Congress intended to have as one of the sanctions for violating the antitrust laws. And, as the court discussed at some length, in Bruce's Juices such sanction relates in no way to the anti-competitive injury which had occurred and in operation it can be extremely capricious.

THE COURT: Bruce's Juices had so many other elements in it. If everybody followed that, everybody would sue American Can and put them out of business. It is a compli-

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2 cated case.

3 Kelly is a stronger case.

4 MR. DONOVAN: I think some of the considerations
5 which were in Bruce's Juices are applicable here. I think the
6 court in Bruce's Juices enunciated the rule which they really
7 meant, which was, if you can prove your contract claim without
8 proving a violation of the antitrust laws then the antitrust
9 claim is no defense. I think that is the situation here.

10 I think they also had in mind the kind of disruption
11 and difficulties that can come in normal commercial dealings
12 if such defenses are going to be allowed.

13 THE COURT: That is why I distinguish it, because
14 this is not ordinary commercial dealing here. You are dealing
15 with a very limited thing. You are dealing with a literary
16 property which is divisible into various aspects. You are
17 dealing with a limited aspect of that.

18 MR. DONOVAN: I would say the substantial disruption
19 of business conduct in this case is at least as great as Bruce's
20 Juices. We have a situation here where Viacom has received
21 part of its properties through a spin-off transaction, or
22 through assignment in connection with the spin-off transaction,
23 from CBS. If Viacom was in the position of having to litigate
24 CBS, compliance with the antitrust laws everytime it wants to
25 enforce one of its syndication rights it is going to be in very

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2 serious trouble.

3 You know, it might actually syndicate its rights
4 in each situation, but it certainly would have a great deal of
5 trouble dealing with producers on a day to day basis everytime
6 they wanted to raise --

7 THE COURT: What consideration did Viacom give to
8 CBS? You say "for value." What was the value?

9 MR. DONOVAN: It was a complicated assignment.
10 However, in effect stock was given back to CBS for all the
11 things given to CBS and stock was distributed to the CBS
12 shareholders.

13 I think that to go back to Bruce's Juices and Kelly,
14 what the holding there was is that there is a very limited
15 exception to the general policy against antitrust defenses
16 in a contract action and this defense is going to apply only
17 when a defendant can show, first, that the contract is intris-
18 cally illegal, that is, illegal on its face. Bruce's Juices
19 is very clear on it and I think Kelly, as well.

20 And, secondly, that the court cannot enforce the
21 contract without accomplishing the prohibited anti-competitive
22 effect. Neither of those things applies here.

23 Clearly the contract on its face is entirely valid.

24 No matter how you view the antitrust claim which
25 Tandem asserts either as an attempted monopolization, a tie-in,

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2 the truth of that violation requires going off the face of the
3 contract to show there was market power; and, secondly, that
4 that market power was exercised, the very things that the
5 Second Circuit was talking about in the American Manufacturers
6 Mutual Insurance Company cases, which we talked about a minute
7 ago.

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9 There is nothing in the contract which could pro-
10 vide any basis whatsoever for such a finding. You have to go
11 off the face of the contract, prove the contract is not intri-
12 sically illegal --

13 THE COURT: You say he could never go beyond the
14 contract?

15 MR. DONOVAN: You can look at the four corners of the
16 contract and if it is valid you cannot assert a defense to
17 it. The Nassau Sports case is the opposite. Here we are
18 talking about a monopolization plan, supposedly, which exists
19 in the National Hockey League and they are saying the very
20 thing which makes that plan go is the reserve clause in all
21 the player contracts.

22 If you look at the contract on its face, it is
23 simply a player, personal service contract, nothing wrong with
24 it. You have to go off the face of the contract, find market
25 power, find its exercise before you can find the illegality.

THE COURT: Here you don't have market power, as

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2 such, I don't suppose.

3 MR. DONOVAN: I think you do. Certainly in a
4 monopolization case, even an assignment, if it is in the course
5 of a reciprocal dealing situation there has to be power there
6 which is used to coerce. Clearly it requires going off the
7 face of the contract to find the illegality.

8 THE COURT: You have to find something outside the
9 contract; no doubt about it.

10 MR. DONOVAN: That was exactly the situation in
11 Nassau Sports and Judge Neaher enforced the contract.
12 Then you turn to the question even if there is illegality on
13 the face of the contract, should it be enforced. The answer
14 is the Supreme Court has clearly ruled it should be enforced
15 unless the court's judgment is going to accomplish the pro-
16 hibited anti-competitive effect.

17 There are two cases here which I think illustrate
18 it very well. In El Salto against PSG Co. the Ninth Circuit
19 was dealing with a contract where it had a violation of the
20 Robinson-Patman Act on the face of the contract. It said this
21 was not dispositive of the antitrust defense.

22 What it said was this:

23 "This case differs from Bruce's Juices, in that
24 the alleged antitrust violation is inherent in the very con-
25 tract sued upon by El Salto. But we do not find the circumstance

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2 dispositive. The Supreme Court has ruled that a Sherman Act
3 violation is not an affirmative defense to a contract suit,
4 even where the violation is inherent in the contract sued upon
5 so long as judicial enforcement of the contract would not be
6 enforcing the precise conduct made unlawful by the Act.***"

7 Another example which relates this principal to
8 our case is Columbia Nitrogen against Royster. There there
9 was an illegal reciprocal arrangement. The parties had,
10 however, prior to the commencement of the contract suit ceased
11 their reciprocal dealing arrangement.

12 The court seeing that the illegal reciprocal
13 dealing arrangement had ceased, determined that its order
14 granting damages to Royster could not in any way exclude
15 competitors or cause the anti-competitive effect which the
16 defense was aimed at so it enforced the contract.

17 I think that is exactly the situation we have
18 here.

19 One final point, which is simply that the New York
20 General Business Law is exactly the same as it is under the
21 federal antitrust defense.

22 THE COURT: You don't have to argue that.

23 MR. DONOVAN: All right; fine, your Honor. I
24 think that covers it.

25 THE COURT: I am going to take just a minute for

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2 another matter.

3 (Recess.)

4 THE COURT: All right, Mr. Gould.

5 MR. GOULD: If your Honor please, I never listen
6 to an argument on one of these antitrust cases without being
7 impressed on the amount of exegesis that is available. I
8 never know what anything means because somebody says it is
9 something different.

10 Bruce's Juices to me means a simple thing. It
11 means you can't buy cans from a fellow, use the cans and make
12 a profit on it and then when he says, "Pay for them," you say,
13 "Sorry, I am not going to pay for them because I bought the
14 cans in a commercial transaction which was tainted by a viola-
15 tion of the antitrust laws."

16 That is what I get out of the cases.

17 THE COURT: What do you get out of Kelly?

18 MR. GOULD: That is the onion case. I think it
19 is the same thing with a little more complication on it. I
20 don't think it is our kind of case. I don't think it is what
21 we had to do in this one.

22 There, first of all, they allege a conspiracy that
23 the plaintiff and the defendants and all the other distributors
24 tried to withhold supplies. And I think the big thing we get
25 out of Kelly that is helpful to us is the doctrine of separ-

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2 ability. I think that is the real answer to this whole problem
3 here.

4 Let me explain what goes through my mind on this
5 and what I think the court has to do with it.

6 This is a unique case. This is something strange
7 that has happened, because it is no mystery to the court or
8 to anybody in this room that for many years the domination of
9 the industry by the three networks with all its concomitant
10 "antitrust implications" was the subject of dispute, considera-
11 tion, legislation, rule making, politicking and everything
12 else. And it is a strange thing that this particular contract,
13 or at least the discussions which lead to this contract, happened
14 just about when the FCC begins to make its move.

15 And what does happen? If we take proof on this, it
16 is going to be as clear as anything. Here is a show, here is
17 a program which is, in effect, rejected by the other two net-
18 works. They come to CBS, which is the last place you can go
19 with it. CBS is in great shape. A stab is made at keeping
20 cut the syndication rights.

21 "No way," they are told, "don't discuss it, that
22 is part of the deal, it's got to be it."

23 And, indeed, as the proofs will show here, that
24 was part of the deal these many years all along the line.

25 THE COURT: Why is it different from saying

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2 "We won't pay you \$70,000, we will only give you \$60,000?"

3 MR. GOULD: It isn't different. They were in a
4 position to get the exact terms they wanted.

5 THE COURT: You won't be able to come in to court
6 on that theory and say, "If we got \$70,000 we should have
7 gotten \$80,000, but they had a monopoly power here that
8 really coerced us."

9 MR. GOULD: I don't think so. I think if your
10 Honor goes back over the history of the situation, the monopol-
11 istic, the coerced effect was in the peripheral rights, in the
12 rights surrounding it.

13 THE COURT: There was no question that isn't an
14 artificial distinction. Why isn't that any different from
15 more money or less money which is a matter of negotiation?

16 A network obviously, especially the last network
17 to be approached, had a great bargaining power and, of course,
18 no matter what bold front they may put on when they come in
19 with a new program their knees are shaking, and that's for
20 sure. So I really don't get this tie-in too strongly, as a
21 visceral reaction.

22 MR. GOULD: I think I understand your Honor there.
23 However, of course, there are two different markets here.
24 There is the network market, the broadcast market --

25 THE COURT: I am trying to distinguish -- and this

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2 is the most difficult thing in the case -- to distinguish
3 between a general antitrust adverse effect on the public and
4 a harm to Tandem.

5 Now, I can see a tremendous harm to the public,
6 as the FCC found, because there is an inherent monopolization
7 and it may be better for the public to have an independent
8 syndication apparatus rather than tie it to the network itself.
9 I can see that.

10 However, when it comes to harming the purveyor,
11 or the producer of the show, why is that any different from
12 paying him less because you have strong --

13 MR. GOULD: Your Honor is not suggesting that the
14 only purpose of the Federal Communications Commission is to
15 protect the public. There were other purposes and they are
16 set forth clearly. It was to protect the packages.

17 As a matter of fact, the complaint on this thing
18 didn't come from the public. The public didn't know anything
19 about what they were doing with syndication rights. It was
20 the producers, the originators of programs who raised the
21 outcry and said, "We are being deprived of a free market."

22 That is what this was all about.

23 THE COURT: I know, but there is a difference
24 between a single case, or, as I say, a price dispute about how
25 much you bargain for, and a general industry pattern which is

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2 quite a different thing.

3 MR. GOULD: Of course it is a different thing.

4 Nevertheless, here I will say the proof, what would be before
5 your Honor, is very simple.

6 THE COURT: Assume the proof, state it any way you
7 want to. That is what I want to know.

8 MR. GOULD: Sure. CBS over a period of years uses
9 its position in the industry to grab off all of the surrounding
10 rights, merchandising rights, syndication rights, whatever they
11 can get. I didn't make that up. The United States Government
12 says so in official documented statements. That is what the
13 FCC thing was all about.

14 Now, along comes Mr. Tandem in the middle of this,
15 just before the government is about to leave and says, "You
16 can't do it any more." And he deals with them in the frame
17 work of that existing situation, and he makes that conventional
18 deal in which they get the peripheral rights that they in-
19 sist upon as a condition of going forward with the package.

20 That they had already been to the other two net-
21 works is immaterial to it. It simply increased quantitatively
22 the amount of economic clout that they could apply to this
23 particular transaction.

24 So he makes his deal. Now, does it really matter
25 to us as the "victims of this transaction" that in the interim

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2 between June of 1970 and, let's say, September 1971, when
3 some piece of paper finally come into existence here, even
4 though they are dated back, does it make any difference that
5 they go through the process of giving the syndication rights
6 to Viacom?

7 Now, I have selected my verb there very carefully.
8 I said, "Giving these rights to the Viacom." Viacom didn't
9 pay for these; there was no consideration for Viacom to CBS.
10 Viacom was simply a spin-off to CBS stockholders.

11 They decided -- and quite properly -- I have no
12 quarrel with this -- they said, "Well, since this FCC has come
13 through, what is the best way to do it. Let's give them to our
14 grandchild, Viacom."

15 Now, Viacom is invested with every disability
16 deriving out of the antitrust laws which is applicable to
17 relationships with CBS.

18 THE COURT: Except you can't sue them for treble
19 damages.

20 MR. GOULD: Except I can't do that.

21 THE COURT: And that is the whole issue in the
22 case.

23 MR. GOULD: I am not trying to sue them for
24 treble damages.

25 THE COURT: I understand.

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2 MR. GOULD: On the other hand, they cannot say
3 that whatever inherent disability there was in the relation-
4 ship between CBS and Tandem it is no defense in an action that
5 we bring because we are not CBS, we are a pure, pristine,
6 virginal branch.

7 THE COURT: I am not arguing about that.

8 MR. GOULD: But they argue it.

9 THE COURT: Let them argue. That is not the
10 issue.

11 MR. GOULD: I don't think it is.

12 THE COURT: The issue is treble damages against
13 CBS under Kelly against Kosuga. That is what the issue is.

14 MR. GOULD: I think it would be absurd to require
15 us to do that. Meanwhile the grandchild enjoys the benefits
16 of the fraud.

17 THE COURT: The question is did the Supreme Court
18 say that in Kelly?

19 MR. GOULD: I don't think it did.

20 THE COURT: Tell me why not. That was what I am
21 waiting for.

22 MR. GOULD: Let's get our facts in Kelly. There
23 they assumed the illegality of the arrangement. I concede that.

24 THE COURT: Let me paraphrase it for you and see
25 if you disagree with my paraphrase. In Kelly the defendant

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2 bought onions from the plaintiff who he said got him to buy
3 it not by fraud -- I suppose he could have alleged that under
4 10(b) 5, or something equivalent --

5 MR. GOULD: I didn't think of that.

6 THE COURT: But because they threatened to flood
7 the market with onions which would have ruined the price, and
8 if all these fellows didn't buy the onions, they may as well
9 have dumped them in the ground.

10 Now, they took delivery of certain onions and didn't
11 take delivery of other onions. There was then a simple suit
12 of failing to deliver the other onions.

13 The defendant said, "Wait a minute, I never would
14 have bought these onions if you hadn't coerced me by violating
15 the Sherman Antitrust Laws -- Sherman 1 -- then, therefore,
16 I shouldn't pay you."

17 The Supreme Court said, "No." They say the
18 remedy is to sue for treble damages and not set it up as a
19 defense to a suit.

20 MR. GOULD: It is wrong.

21 THE COURT: You can say it is wrong, but I am bound
22 by it. Now, that is my problem.

23 MR. GOULD: Your Honor, I think there is all the
24 difference in the world. First of all, there was a unitary
25 contract, to adopt my friend's term. It was concerned with

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2 the delivery of onions, whether you took them and paid for
3 them or didn't take them.

4 THE COURT: He discussed the separability there and
5 said it was a serquitious argument and was not going to bother
6 with it.

7 MR. GOULD: Maybe it was. Nobody can argue that
8 you can take the syndication rights away from the principal
9 rights, the economics, the broadcasting. They did take them
10 away; they did divide them. You couldn't have done that with
11 the onions.

12 THE COURT: Let me put it this way: Treated as an
13 equitable rescision case, suppose you wanted to rescind --
14 Tandem wanted to rescind the transaction on the ground of in-
15 equity and antitrust, wouldn't they have to restore syndication
16 in order to get rescission?

17 MR. GOULD: If all I was trying to do was restore
18 the syndication part of it, probably I would do that right now.
19 Who am I going to rescind?

20 THE COURT: You are jumping a step.

21 MR. GOULD: Yes, of course. Who am I going to
22 rescind? CBS says, "We don't own them any more, we haven't
23 got them."

24 I can't go against them for rescision. Viacom
25

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says, "I am pure."

THE COURT: CBS, by saying "We never would have given you ALL IN THE FAMILY if you hadn't coerced us." Sure, you can do that.

MR. GOULD: Of course.

THE COURT: So sue them.

MR. GOULD: In the meantime the grandchild is coming in, the fellow who got it is coming in and trying to prevent us.

THE COURT: You can't have your cake and eat it, too.

MR. GOULD: I don't want my cake, but simply to defend against the grandchild.

THE COURT: If you have damages against CBS you will have ample reprove.

MR. GOULD: I am not sure. Why can't I get both?

THE COURT: Because the Supreme Court says no in Kelly.

MR. GOULD: No. In Kelly it is dealing with the unitary contract. You see, I don't have the problem they had in Kelly because they decided it for me. They have divided these two things. This isn't just a severable contract. This is a situation where the severance has taken place.

THE COURT: Are you saying that would have been

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a good defense if there had been no spin-off? Is that what you are trying to say?

MR. GOULD: It would have been a different thing to deal with.

THE COURT: I want to get the analytical thing. Suppose CBS still had the syndication rights.

MR. GOULD: We would be in the same position as we are right now.

THE COURT: They divided. What had they divided? Divided by a spin-off?

MR. GOULD: That is the way they did it.

THE COURT: Now, it is irrelevant what you just said.

MR. GOULD: Irrelevant as giving them any defenses against CBS. I think they are in the same position.

THE COURT: I don't follow the language. What is the relevance of your statement that they themselves divided the rights? What point of time are you speaking of?

MR. GOULD: When the spun off.

THE COURT: Therefore, I asked you would there be any difference if they hadn't spun off.

MR. GOULD: The same thing.

THE COURT: Then why do you mention it?

MR. GOULD: You see, in this case there are separate payments made for the syndication. They don't just hand us a lump of money.

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2 THE COURT: That is true in any copyright.

3 MR. GOULD: It wasn't true in Kelly against
4 Kosuga.

5 THE COURT: No, but it is true in any copyright
6 by custom of the trade or otherwise. There are various rights.

7 MR. GOULD: And in the block booking case it was
8 true that the one C covered the good pictures and the bad
9 pictures, and that is the way they did it.

10 Here we have a difference. It isn't as bald as
11 that. Here you actually have separate fees. You have a fee
12 for broadcasting the show, you have a fee for syndication of
13 it.

14 THE COURT: Yes, but how does that differ from the
15 normal course, let's say, theatrical production in the movie
16 business, a studio financed the picture and they say, "naturally
17 we will be the distributor, UA will do the distributing".

18 They say, "We are not going to finance you unless
19 we are the distributor."

20 What is wrong with that?

21 MR. GOULD: With respect to distribution they could
22 do it and then when they go and say, "you have got to show it
23 in our theaters," they wouldn't let them.

24 THE COURT: Syndication here is used loosely. It
25 is not a grant of anything except a right to the distributor.

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2 That is all that really CBS reserves.

3 In other words, "You will need a distributor,"
4 they say, "So let it be us instead of somebody else and we
5 won't charge you any more."

6 MR. GOULD: That is a different thing: "We won't
7 charge you any more."

8 You say, "Let it be me and I won't charge you any
9 more" and I can go down the street and get it for 30 instead
10 of 40 percent."

11 THE COURT: You might.

12 MR. GOULD: Not "might"; we do.

13 THE COURT: It is purely a question of whether or
14 not CBS gets that extra vigorish of distribution fees for which
15 they have --

16 MR. GOULD: That is correct, and we can make a
17 demonstration here that there were other places to put the
18 syndication rights at lower percentages, but we never got a
19 chance to do that. That is what it is all about.

20 I didn't make that up. That is what the FCC's
21 proceedings were all about. You couldn't go to the other
22 distributor. There was no other market for them.

23 THE COURT: I am not going to pass on whether or
24 not you have a triple damage suit against CBS.

25 MR. GOULD: I don't want you to.

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2 THE COURT: They are not here as a party. Avoid
3 that. The question is what defenses are available in an action
4 of this kind.

5 MR. GOULD: I suggest to your Honor that we are in
6 no different position from one where a man got certain rights
7 by illegal means, coercion, fraud; it doesn't matter what we
8 call them.

9 Here I say by the use of monopolistic coercive
10 economic power, which the FCC and the courts denominate as
11 illegal, he has the benefits of that. He gives those rights
12 over to his own creature, to Viacom, which is, for our purposes,
13 himself, and Viacom, says, "Now I am going to sue and force
14 him."
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bag 1

MR. GOULD: And we say, "Well, wait a minute. You can't enforce them. You have no more rights than the fellow who took them away by force." And that is what it comes down to. It does not affect in one iota their ability to go on exhibiting the program. They can go right on showing All in the Family. The only question is whether they had the power to pass along to somebody else these distribution rights, these syndication rights.

THE COURT: We know all that. That is not the problem now. The problem is what is there in the antitrust laws that gives a person a right to put in as a defense to a contract rather than a trouble damage suit or a criminal prosecution. This is what the issue is.

MR. GOULD: We have loads of cases.

THE COURT: Like what?

MR. GOULD: Where it was asserted as a defense.

THE COURT: Like what?

MR. GOULD: All these cases in the brief where the antitrust agreement, the antitrust implication is.

THE COURT: Don't give me the old cases of Continental and all that.

MR. GOULD: They are all that --

THE COURT: Give me new cases, modern cases.

bag 2

MR. GOULD: I don't know. Do we have any modern cases? Now what is your Honor's distinction?

THE COURT: I don't say it facetiously. It is because Justice Brennan in the Kelly against Kosuga case purported on behalf of the supreme court to review the state of the law, and that is what I must go by.

MR. GOULD: We do cite a couple of New York cases.

THE COURT: That doesn't help.

MR. GOULD: I know. I recognize that they are not compelling authority. On the other hand, there is no authority on the other side except Kelly.

THE COURT: I will read them but I don't --

MR. GOULD: And Kelly, I say, is so clearly distinguishable from this because of the --

THE COURT: We have been over that, but the question is, what do you have affirmatively on your behalf that sustains this defense?

MR. GOULD: I don't know, your Honor. I am going to look through them and see if I can quote something.

THE COURT: Ask the fellows at the table.

MR. GOULD: I am doing that now.

Mr. Ferraro mentions Associated Press. Your Honor has already commented on that. I am trying to see

1 beg 3

2 whether we have anything by way of authority to add.

3 Mr. Ferraro points out to me the case that is
4 , cited at page 26 of our memorandum, that Western
5 Geophysical. That is a second circuit case, but the
6 appeal was dismissed. I don't know.

7 THE COURT: Yes, I remember that.

8 MR. GOULD: So I don't know how good it is for
9 the purposes that we are discussing right now.

10 THE COURT: That was a mixed up case anyhow.
11 It had various Clayton Act and Sherman Act defenses
12 mixed up in it.

13 MR. GOULD: With respect to the reliance that
14 was with respect to the Aryester case, of course, there
15 the dealings had already, I think your Honor pointed
16 out, they had already been terminated, and here they
17 haven't been terminated. Here they have given them to
18 what I -- and I am not being funny about this either --
19 I call them the grandchild, and it's simply a play on the
20 old grandfather treatment in the holding company cases.

21 Viacom is a grandchild of CBS, the original --

22 THE COURT: Treat it as if CBS still had the
23 rights. I don't care much about that.

24 MR. GOULD: I think if CBS still had the rights,
25 we could be in here with the same defense.

1 beg 4

2 THE COURT: Under what case.

3 MR. GOULD: I haven't got a case other than what
4 has been cited. Other than with the infirmity
5 that your Honor has pointed out.

6 On the other hand, I don't think there is a case
7 that says no.

8 THE COURT: Let's assume that for the moment
9 arguendo. Do you have an affirmative case? When I say
10 affirmative, I mean a case where a defense under the
11 Sherman Act has been permitted by the court in an action
12 for damages on the contract or in a suit in equity based
13 upon a contract? Or even better, in a patent or copyright
14 situation?

15 MR. GOULD: Yes, that would be better perhaps.

16 THE COURT: What have you got?

17 MR. GOULD: I don't know of any cases that we
18 talked about in our discussion which would not be subject
19 to your Honor's characterization before that they are
20 old cases. There are no modern ones.

21 THE COURT: Let me put it as a proposition to you,
22 Mr. Gould, because this is what my mind is running to:

23 Where you have a situation of this kind, I
24 think it fairly clear that the supreme court has said that
25 generally speaking defenses of antitrust violations in

1 beg 5

2 contract actions are not favored by the Courts.

3 I did not make it up. That is an exact quote
4 almost from Kelly, as I recall it.

5 There is one limitation, and that is, if in
6 order to enforce the contract the Court compels the
7 defendant to do something which is itself violative
8 of the antitrust laws, in effect, that may be one
9 exception.

10 Assume for the moment that I am right.
11 What is there in the second proposition that supports
12 your position, Tandem's? Why would I be enforcing a
13 violation of the antitrust laws if I allowed the
14 plaintiff here to prevail?

15 MR. GOULD: I think that is exactly what the
16 Court would be doing, and I think that has been our
17 position from the beginning.

18 THE COURT: How? Tell me why.

19 MR. GOULD: I think that you would be saying
20 to CBS, "Here you have got these syndication rights by
21 the same economic coercive methods which are so vigorously
22 condemned by the administrative body with the maximum
23 expertise in the subject. You have got them by those
24 methods.

25 You gave them over to your creature, to Viacom.

1 beg 6

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2 Viacom is trying to enforce these rights now. Viacom
3 is in no better position than you would be in, and
4 therefore, all you are doing is adding another step in
5 the process of economic coercion which you have obtained
6 such rights."

7 THE COURT: All right, now go back to the
8 onions then. Putting the situation by analogy, the
9 plaintiff in the onion case was by definition a man who
10 coerced the purchase of the onions improperly and unfairly,
11 like CBS in your case. He then seeks to get damages for
12 a breach of contract which is a failure to deliver the
13 onions, and says, although it would seem on the face of it
14 to be equity to allow it without coercion, you can't
15 do it.

16 MR. GOULD: I think that --

17 THE COURT: What is the difference?

18 MR. GOULD: I think I know what the difference is.

19 THE COURT: Let me hear it.

20 MR. GOULD: I think that any court is
21 disenchanted with a process by which a man is allowed to
22 keep the fruits for himself of a transaction and not pay
23 for them in one way or another.

24 THE COURT: You have got a couple of million
25 dollars out of All in the Family.

beg 7

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MR. GOULD: Out of the syndication rights, we haven't got a dime from the syndication.

Well, we got some, but they are negligible.

THE COURT: I think that is the only distinction, when you get to the end of the argument, that it's a severable contract.

MR. GOULD: It's severable. It's a completely different contract really. It's a completely different contract, and that is why I made the point before that they have demonstrated that difference by the way they themselves have treated it, and I think that is a very important point. If I were a Judge, I would be very much disturbed to have a fellow come in and say, "Well, I bought your cans or your onions or your beans or anything else, but now the hell with you, I am not going to pay for them because you did something wrong in a process."

We are not trying to do anything like that. Viacom didn't pay us for any syndication rights. Viacom loses nothing here if they haven't got the syndication rights, nothing that they paid for.

THE COURT: That has no bearing.

MR. GOULD: I think it has, your Honor.

THE COURT: Let us not argue that now. That is

1 beg 8

2 not an antitrust problem.

3 MR. GOULD: But I think we come to the
4 rationale for the modern cases in which the Courts have
5 refused to let a man say, "I won't pay, antitrust." I
6 think that is what it comes down to. I can't see anything
7 else.

8 THE COURT: Kelly goes beyond that.

9 MR. GOULD: I don't know.

10 THE COURT: Kelly goes beyond that, because
11 in Kelly, and that is why I said that other case in the
12 Fourth Circuit, wherever it was, was wrong, with all due
13 deference, of course, and that is because they hadn't got
14 the onions yet and they hadn't paid yet. It's all an
15 on-going transaction in the future, and yet the Court
16 said that. There is one case where you think they might
17 say sure it's a good defense, but they didn't.

18 MR. GOULD: I don't know. Here, of course, we
19 have got a different party. We have got a mature
20 transaction. It is severable. That is all we can point
21 to.

22 THE COURT: All right, I just want to get
23 everybody's views on the table. I will reserve decision,
24 as I indicated. If I find that I can decide it one way or
25 the other before the defendant's case begins, I will do so.

1 beg 9

2 Otherwise I will reserve.

3 MR. GOULD: I am sorry, I didn't hear your
4 Honor.

5 THE COURT: I say that I will reserve decision
6 now. I hasten to say you should put in your 9G in there
7 or whatever affidavits you want. I am treating it as a
8 motion for summary judgment. Put them in say by
9 Wednesday night. I will reserve decision, and if I can
10 decide it either way before the defendant's case begins,
11 I will do so. If I cannot, I will just have to reserve,
12 and I may have to hear the antitrust defense even though
13 it may be futile or wasteful.

14 MR. GOULD: We will get our papers in on it.

15 THE COURT: Or we can decide then whether or
16 not to adjourn for a couple of days or a week or something
17 like that. I don't want to come to that until I reach it.

18 MR. GOULD: Let's see where we are at that
19 point, your Honor.

20 THE COURT: Yes, all right.

21 MR. GOULD: And do it in the way that is most
22 convenient to the Court.

23 THE COURT: Are you ready, Mr. Pearsall, to begin
24 the presentation of evidence?
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TRIAL, SEPTEMBER 17, 1973
(Transcript, pages 79-80)

1 bsg 6

2 THE COURT: Well, it's in the record. There is
3 no argument about that.

4 MR. GOULD: If it is, I don't know whether we
5 did or not.

6 I know your Honor suggested it, but I wasn't
7 conscious that I had agreed to it. The only problem
8 about it, your Honor, is that if your Honor denies the
9 motion in the antitrust defense and we have to go forward
10 with that aspect of the defense, then we are going to
11 need more time.

12 THE COURT: You may need more time, and you may
13 get more time. That is not what I asked you.

14 MR. GOULD: That is what I am concerned with.
15 That is the only reason I am hesitating about it.

16 THE COURT: You don't have to be concerned about
17 that.

18 MR. GOULD: That is all right, then, let's go
19 forward and I will agree.

20 THE COURT: All right, let's have a stipulation
21 on the record then so we don't have any problem.

22 MR. GOULD: Well, for all the purposes of this
23 case, this hearing subject to our right and your Honor's
24 consideration of it, to ask for more time on the
25 antitrust defense if it becomes necessary, this hearing is

1 bsg 7

2 the hearing and the trial, and what can result therefrom
3 will be a temporary and permanent injunction.

4 THE COURT: Is that agreeable to the plaintiff?

5 MR. PEARSALL: That is agreeable.

6 MR. GOULD: If your Honor finds for the
7 plaintiff.

8 MR. PEARSALL: Absolutely.

9 MR. GOULD: In other words, we will get an
10 ultimate adjudication of the issues in this proceeding.

11 MR. PEARSALL: Yes, that's correct.

12 THE COURT: Fine.

13 MR. PEARSALL: The plaintiffs will call Mr. Sipes.

14 THE COURT: All right, it is on the record,
15 and I just want to call your attention to the fact that
16 my memory isn't too bad. On July 22, I dictated a
17 memorandum in the presence of counsel which said
18 I set the trial down for September 17, and both parties
19 indicated they would stipulate that this trial should
20 include not only the temporary injunction but a permanent
21 injunction as well.

22 MR. PEARSALL: That is what my recollection is.

23 MR. GOULD: I didn't remember.
24
25

Service of 5 copies of the
within Appendix is hereby
admitted this 9th day of

x 3 Vols.

Aug. 1974
Signed James F. Pauer

Attorney for Plaintiffs - Appellees